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J. Henry Park
REPORTS OF CASES
ARGUED AND DETERMINED

IN

The Court of Exchequer in Equity;

FROM

HILARY TERM, 6 WILL. IV. TO MICHAELMAS TERM,
1 VICT., BOTH INCLUSIVE.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



BY

EDWARD YOUNGE, Esq.
OF THE MIDDLE TEMPLE, BARRISTER AT LAW;

AND

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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD OF THESE REPORTS.

The Right Honorable JAMES, Baron ABINGER,
Lord Chief Baron.

BARONS.

Sir JAMES PARKE, Knt.
Sir WILLIAM BOLLAND, Knt.
Sir EDWARD HALL, ALDERSON, Knt.
Sir JOHN GURNEY, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MONSEY ROLFE, Knt.

A

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ERRATA.

- Page 3, line 11, *delete the words* "tender of costs to be taxed and."
 3, line 12, *insert* after the word "contempt" *the words* "on tender of the costs of the contempt."
 12, *delete lines* 14 and 15, and *substitute* "in aid of the defence to the action; omitting all prayer for relief." And *see* the marginal note corrected in the Index, p. 746.
 115, line 21, *for* "clerk" *read* "court."
 372, *see* the marginal note corrected in the Index, p. 734.
 375, *see* the marginal note corrected in the Index, p. 750.
 552, line 2, *delete the word* "and;" and in line 3, before the word "William," *insert the word* "one."
 611, *see* the second marginal note corrected in the Index, p. 738.
 614, line 1, *for* "a court of law" *read* "this Court."
 662, *see* the second marginal note corrected in the Index, p. 739.
-

Court of Exchequer.

GENERAL ORDERS IN EQUITY,

Tuesday, the 6th Day of June, 1837.

1837.
June 6th.

ORDERS
in the
EXCHEQUER.

I. WHEREAS the present practice, that causes can only be entered for hearing on the seal day after every term, and that the *subpoena ad audiendum judicium* can only be returnable in term time, is productive of delay and inconvenience: THE COURT DOTH ORDER, That from and after the last day of the present Trinity Term causes may be set down for hearing, and the *subpoena ad audiendum judicium* be served, and made returnable on any day as well out of term as in term, but every such *subpoena* is to be served, in a country cause fourteen days, and in a town cause ten days, before the same is made returnable. AND IT IS ORDERED, that service on the clerk in court for any party of a *subpoena ad audiendum judicium* shall be deemed good service.

II. AND WHEREAS inconvenience arises from there being great irregularity in the times of opening and shutting the King's Remembrancer's Office: IT IS HEREBY ORDERED, that the said office be kept open from nine o'clock in the morning until half-past four in the afternoon, holidays excepted, from the first day of every term until the last day of the sittings of the court after every term, and at all times when the court shall be sitting, and at all other times from half-past nine o'clock in the forenoon till four o'clock in the afternoon.

III. AND IT IS ORDERED, that every notice of motion, and every petition whereof notice is necessary to be given, shall be served, and all affidavits intended to be read in support thereof be filed at least two clear days before the hearing of such motion or petition, unless otherwise specially ordered by the Court; and all affidavits intended to

1837.

June 6th.

ORDERS
in the
EXCHEQUER.

be used in opposition to any motion or petition shall be filed before they are read in court.

IV. AND IT IS ORDERED, that the defendants shall not be required to sign each skin of an answer, but that every answer shall be deemed good and sufficient if the defendants do sign the last skin thereof, and the last skin of the schedule or schedules thereto.

V. AND IT IS ORDERED, that it shall be deemed sufficient if the caption of the answer of every defendant who is unable to write his or her name, and which shall be taken before commissioners in the country, states that the answer purporting to be sworn to by the defendant was read over to such defendant, who appeared perfectly to understand the same, and made his or her mark thereto, in the presence of the commissioners before whom such answer was sworn, without requiring an affidavit of the answer having been so read over.

VI. AND IT IS ORDERED, in all cases of pleas, demurrers, and exceptions to answers or to master's reports of scandal or impertinence, copies of the bill, plea, or demurrer, answer, and exceptions, and master's report, be delivered by the party who sets down the same at the chambers of the judge before whom the argument is to come on, one clear day at least before the day appointed for such argument; but in cases of scandal or impertinence the same copies are to be delivered to the judge as were laid before the master on the reference.

AND IT IS ORDERED, that the foregoing orders shall take effect from and after the last day of this present Trinity Term, and that the same be entered with the registrar, and that copies of the same be put up in the King's Remembrancer's Office, and the several offices of this court.

ABINGER.

J. PARKE.

W. BOLLAND.

E. H. ALDERSON.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of Exchequer in Equity.

MEMORANDA.

ON Saturday, 16th January, 1836, at the Palace at Brighthelmstone, the Lords Commissioners resigned the Great Seal, which was on the same day delivered by His Majesty to Sir *Charles Christopher Pepys*, Knt., as Lord High Chancellor of Great Britain, who was thereupon created a Peer by the title of Baron *Cottenham*, of Cottenham, in the county of Cambridge.

About the same time *Henry Bickersteth*, Esq., one of His Majesty's counsel, was appointed to the office of Master of the Rolls, and was created a Peer by the title of Baron *Langdale*, of Langdale, in the county of Westmorland.

SYMONS v. SYMONS.

BY the decree in this cause it had been referred to the Master to take an account of the lands and hereditaments to which the petitioner, an infant, was entitled under the

1836.

Jan. 13th.

Upon the administration of the real property of an infant, this Court will not delegate to the

Master the power of approving leases of the estates.

1836.

SYMONS

v.

SYMONS.

marriage settlement and will of his father, and of the rents and profits received since the death of the testator, and to appoint a receiver, and to report what was proper for maintenance; and the receiver was from time to time to let and set the property.

The petition stated that the Master had approved of a receiver, and that many of the lands were held by leases under a power in the settlement, and others remained unoccupied; that the rents were too high; and that repairs were necessary, &c.

The petition prayed that the Master might from time to time report the state of the premises, and whether repairs were necessary, and out of what fund they should be paid, &c.; and whether it would be for the benefit of the infant that any reduction should be made in the rents; that the Master might from time to time receive proposals for taking leases conformable with the power; and that, when and as the Master should accept of such proposals, the trustees of the settlement might execute leases of such lands agreeable to such proposals, &c.

Mr. *Hall*, for the petition, expressed a doubt whether the latter part of the prayer of the petition was correct, as it implied that the Master's approval of the leases was to be final. He mentioned *M'Dermott v. Kealy* (a),

The Court was of opinion that that part of the petition could not be granted, and made an order directing the Master to take proposals for leases, and from time to time to report his opinion upon the same to the Court.

(a) Jac. 374.

1836.

WHITEHEAD *v.* CUNLIFFE.

Jan. 19th.

MR. BOOTH moved to take the answer off the file, the name of the counsel who drew it being omitted on the record. Record amended by adding counsel's name to the answer.

The counsel for the defendant stated that he had signed the draft.

The Court ordered the record to be amended by the insertion of counsel's name.

EDMONSON *v.* HEYTON.

MR. PURVIS moved that the defendant might now, on tender of costs to be taxed and certificate of answer filed, be discharged out of custody for contempt. He cited *Gray v. Campbell (a)*. Order made ex parte to discharge a defendant in contempt for not answering, on certificate of answer filed and tender of costs.

Ordered.

(a) 1 Russ. & M. 323.

NEATE *v.* Duke of MARLBOROUGH.

Jan. 23rd.

THE bill interrogated the defendant whether a sum of 2000*l.*, or some other and what sum, was not lent to him on bond of a certain date, or some other and what security, and when? The words "knowledge, information, remembrance, and belief," if stated at the commencement of an answer as

applying to the whole, will govern the whole answer.

If a bill state a fact, not denied by the answer, by which it appears that the defendant has the means of making an inquiry, he must answer as to the result of his inquiry.

1836:
 NEATE
 v.
 Duke of
 MARLBOROUGH.

The defendant commenced his answer by a statement, that he intended to answer the bill according to the best and utmost of his knowledge, remembrance, information, and belief. Afterwards, in answer to the particular inquiry relative to the 2000*l*., he stated (without using the words knowledge, remembrance, &c.) that he was unable to set forth what sum of money he borrowed, but he admitted that he had borrowed some money and gave a bond for it, though when he did not know.

An exception having been taken to the answer for insufficiency in this respect—

The Court overruled the exception; at the same time observing, that information and belief upon a point was in nine cases out of ten immaterial.

The bill also charged, that another bond, which had been given by the defendant, had been prepared by his attorney. The defendant did not deny this, but stated that he was unable to set forth whether such bond had been given. An exception was taken to this part of the answer.

Per Curiam.—Where a bill states a fact not denied by the answer, whereby it appears that the defendant has the means of answering as to his belief, by making inquiry, then his stating that he is unable to set forth, &c., is not sufficient. He ought to make such an answer as might be sufficient to have the cause heard on bill and answer. The plaintiff ought not to be driven to go into evidence.

Exception allowed.

1835.
Dec. 15th.
1836.
Feb. 19th.

DARTHEZ, Brothers, v. LEE and SAMA.

THE bill stated, that Juan Sama, a merchant of Havana, had, for some years previous to the year 1834, been in the habit of purchasing cutlery of Messrs. Vanwart & Co., merchants and factors at Birmingham; and that when the latter sent goods to Sama, they retained for his use a pattern or specimen of each article so marked as to enable Sama to write to his agents in England respecting it. That in 1834, Sama, by means of S. M. Arcos, his agent in England, effected an arrangement of opening a credit and account with the plaintiffs, who were merchants and partners in London, for the more ready payment for the goods shipped on Sama's account. That the defendant, Thomas Lee, was then a factor at Birmingham and London; and that in August, 1834, an agreement was entered into by means of Arcos and the plaintiffs with the defendant, that the latter should in future make the purchase of cutlery goods for Sama, subject to the approval of Arcos. That Lee should receive a certain commission on such purchase, and that the plaintiffs, as the agents or correspondents of Sama, should be responsible to Lee for the price of the goods, and also for his commission and charges, upon his bringing to them invoices thereof, counter-signed by Arcos, by way of approval. That, upon such agreement being entered into, the specimens or patterns in the hands of Messrs. Vanwart & Co. were delivered up to the defendant Lee for the purposes of his said agency, and subject thereto to belong to and remain the property of Sama. That the defendant Lee accordingly entered upon the duties of his said agency upon the terms aforesaid, and from time to time purchased and shipped goods

If A., a merchant in England, guarantee the payment of all purchases made by B., a factor in England, for C., a merchant abroad, subject to the approval of X., an agent of C., A., being simply the paymaster or guarantor for C., can maintain no bill for an account against B. unless he state a case of collusion between B., and X.

A party who has once admitted an account delivered to be correct, cannot afterwards file a bill to have the account taken in equity upon the mere allegation that he had no means of ascertaining that the account so delivered was correct, without charging specific acts of fraud against the defendant; and it is not necessarily an allegation of fraud to say, that the accounting party agreed to deliver up certain chattels demanded by the other, upon condi-

tion of having his alleged balance admitted and paid.

1835.
DARTHEZ
v.
LEE.

for Sama, and retained the patterns of goods sent, in the same manner as Messrs. Vanwart had done; and that in 1835 Sama sent a friend or agent to this country, who also delivered to the defendant Lee other patterns for the purposes of Sama's trade.

The bill then alleged, that the defendant Lee from time to time delivered accounts to the plaintiffs, purporting to be (though the plaintiffs were unable to ascertain whether the same were in fact) just and true accounts of the several purchases made by him on Sama's account, in which accounts the patterns, as well as the goods actually shipped, were charged for. That during Lee's agency he purchased goods (though to an inconsiderable amount) for the plaintiffs on their separate account, as well as for Sama; and that upon the two accounts the plaintiffs had paid to him divers large sums of money; and that, by the means aforesaid, an open account had arisen and still subsisted between him and the plaintiffs. That Lee claimed a balance of 1750*l.*, as due from the plaintiffs to him on these two several accounts. That the plaintiffs had applied to him to come to an account with them in respect of the foregoing transactions, and, upon payment of what was justly due from them, to deliver up to them the patterns or specimens which were in his possession. That the defendant had refused to comply with this request, and had brought his action against the plaintiffs (with the exception of the plaintiff Darthez the elder, who at the time of bringing the action was temporarily out of the jurisdiction) to recover the alleged balance of 1750*l.*

The bill charged that the plaintiffs, except as regarded the goods bought expressly on their own account, were merely the agents of Sama; that Lee dealt with them in that character, and that it would appear from Lee's correspondence with Arcos and others that he knew he was so dealing. That the detention of the patterns was injurious to Sama's trade, and that the plaintiffs were an-

swerable to Sama in that respect. That Lee had agreed to give up the patterns upon having the alleged balance admitted and paid. That such requisition was evidence that the accounts rendered by Lee were not just and true accounts, and therefore, to ascertain the truth of them, the defendants were entitled to a discovery of various books and documents in the hands of the defendant. In proof of these circumstances the bill set forth a long correspondence between the respective parties and their solicitors and agents; but it appeared that the plaintiffs, in one of their letters to Lee, had offered to pay him his alleged balance upon having the patterns delivered to them.

1835.
DARTNES
v.
LEE.

The bill prayed for a discovery of facts and documents relating to the transactions mentioned in the bill, for an account, injunction, &c., and the delivery up of the patterns.

To this bill the defendant Lee demurred for want of equity.

Mr. G. Richards, for the demurrer.—The object of the bill is to enforce the delivery of these patterns, not to the plaintiffs, but to Mr. Sama. The plaintiffs have no interest whatever in the patterns; on the other hand, they are liable to an action by Lee upon their guarantie, and that action they seek to restrain upon the mere allegation that there are open unsettled accounts between them and Lee. *Frietas v. Dos Santos* (a) is an authority to shew, that a bill suggesting in mere general terms that there are mutual unsettled accounts, is not maintainable. It may be said that those accounts include the private account with the plaintiffs; but, if so, the bill is multifarious. The plaintiffs do not deny their liability to pay the balance, but insist upon the delivery up of the patterns as a condition of payment. They have no right, however, to make such

(a) 1 Y. & J. 574.

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terms. Their stating Lee to be the agent of Sama, is a mere subterfuge, in order to threaten him with a long account in equity if he refuses to comply with their demand. If they had stated circumstances shewing that some discovery was necessary for taking a true account of their dealings with the defendant, they might have come into equity for that purpose; but that is not their case.

Mr. *Temple*, and Mr. *Rogers*, for the bill.—The bill is brought for an examination of accounts, for which the plaintiffs have to account over, and for the delivery up of specific chattels. They are entitled to the first part of the relief which they seek on their allegation that they do not know that the balance charged against them is just; and to the second part, on the authority of *Lowther v. Lowther* (a), and *Nutbrown v. Thornton* (b). When a wrong cannot be properly recompensed in damages, equity will give relief. The plaintiffs could bring no action to recover the specific patterns. [The *Lord Chief Baron*.—You could bring no action at all: nor can you come into equity upon such a bill as this. You have undertaken to pay such monies to the defendant as Arcos shall certify to be just. You do not suggest any collusion between Arcos and the defendants. How, then, can the fact of Sama's having got you to give your guarantie give you an equity against the defendants?] Sama being abroad, constitutes the plaintiffs his agents and factors in this country; and the plaintiffs, under this general authority, make a bargain with Lee in their own names. They are answerable, no doubt, upon their guarantie as original contractors with Lee; but they are accountable to Sama, that they will charge him no more than the just amount due; and they can only charge him through the medium of an account with Lee. Lee purchased the goods and retained the patterns; and it is stated in the bill that he charged the plaintiffs in account

(a) 13 Ves. 95.

(b) 10 Ves. 159.

with these patterns. He cannot therefore call on the plaintiffs to pay without rendering a true account. [The *Lord Chief Baron*.—Do you suggest any reason to believe that the account rendered is untrue?] The bill alleges that the truth of the account cannot be ascertained without discovery. It is not necessary to allege fraud in a bill for an account; *Corporation of Carlisle v. Wilson* (a); but, if it were so, the statements in the bill as to the requisition made by Lee to have the balance admitted, is a sufficient allegation of fraud. Besides, the bill prays for discovery, which is sufficient to warrant a decree for an account. *Barker v. Dacie* (b). [The *Lord Chief Baron*.—Does the bill charge that Sama has given notice to the plaintiffs of fraud on the part of Lee?]

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Mr. *Richards*, in reply, was stopped by the Court.

The LORD CHIEF BARON.—In order to support this bill, the counsel for the plaintiffs are driven to make a modification of the terms of the contract contrary to its legal effect. In allowing this demurrer, I do not intrench upon any one of those principles by which Courts of equity are guided in matters of account. No doubt, without alleging fraud, a party is entitled to an account in equity, where the nature of the transactions renders the taking it there more convenient than elsewhere, or at least as convenient as in a Court of law: I do not deny that proposition. If, for instance, the parties allege that the accounts which have been rendered are intricate, and that some doubt exists as to the balance, that would be a good ground for seeking for an account in equity, although an action might be brought at law upon the same matter; and there would be no occasion in such a bill to suggest fraud. But there are cases where an account having been stated and admitted

(a) 13 Ves. 276.

(b) 6 Ves. 681.

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by a party, he ought to state the grounds of his coming into a Court of equity for relief, lest it should appear that his bill has been filed for the mere purpose of delay. For instance, if he states that an account has been delivered which he has at one time admitted to be just, but the truth of which he cannot precisely ascertain, and therefore comes to have the account taken in this Court—that alone is not sufficient; he ought to go further, and say, that since the account was delivered he finds that he has been imposed upon, and therefore his admission of the account ought not to bind him. That, no doubt, would be a good ground for his coming into this Court: but generally, the grounds for equitable relief in cases of this nature are—either if the opposite party refuses to account, or there is a difficulty in taking the accounts, or some discovery is necessary before the account can be taken.

Now, what are the facts of this case? The whole interest of the plaintiffs consists in their undertaking to pay Lee the amount of such invoice as Arcos shall certify. The account is simple enough. They cannot be liable at law unless the invoice is previously settled by Arcos. It is not suggested that no accounts were delivered, but it is said that they are not able to judge whether the balance is correct. The meaning of the bill therefore is, that the account was at one time correct and admitted, but because the party would not give up certain specimens, the plaintiffs would not pay the balance. Is that a ground for the interference of a Court of equity? The fact is, that Sama has an agent, Arcos, living in England, whom he has appointed to ship his goods, but he wants a person in London to pay for those goods, and Darthez engages to pay to Lee the amount of them as Arcos shall certify to be correct. Does that give Darthez a right to file this bill against Lee? He could not in a Court of law resist Lee's demand, nor can he in a Court of equity, because he has undertaken to pay on that certificate. If the defendant

had given a certificate which Arcos could not explain, Darthez might then have had a ground for seeking the relief which he now asks ; but, unless he can make out a case of fraud as between Arcos and the defendant, he has no right to come into equity with such a bill as this. The purchase of the goods was an affair, not between Darthez and Lee, but between Arcos and Lee. The bill, however, suggests no fraud in Arcos. The plaintiffs admit that they are willing to pay the balance if Lee will deliver up the specimens to Sama. They have no interest, however, in that. If Sama claims them, let him do so by himself, or by his authorized agent Arcos : he can do no act to the prejudice of the plaintiffs, by reason of Lee's refusal to give up those specimens. If he were to set up any claim against the plaintiffs in that respect, they might say, we were bound to pay Lee the invoiced price of the goods, but we had nothing to do with the specimens.

If the bill contained a statement that Sama had given the plaintiffs notice of some fraud committed by Arcos or Lee, and had required the plaintiffs not to pay the balance till the accounts were delivered and investigated, the plaintiffs might say they were entitled to an account from the defendant before they made such payment, because they had notice from their principal of a fraud committed, and they could not safely pay it now. That would form a just ground for their refusal to pay. But they do not suggest that. I asked a question upon that point in the course of the argument, and it was not said that any notice had been given from which I could see reason to believe that the plaintiffs had been imposed upon. If they allow the documents between Lee and the agent who had the disposal of the goods to be true, they could not join issue with the defendant at law, and how can they then in equity? Never was there a case, denominated one of account, more unjustifiable than the present. I protest against the conclusion of fraud which has been drawn from

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the statement in the bill. The plaintiffs, like bankers, had only to pay the money due on their guarantie, and when they had done that they would have done their duty. As to their claim upon Lee for the patterns, Lee may well say, *non hæc in fœdera veni*; if Arcos has any complaint to make upon that subject, let him do so.

Demurrer allowed.

Feb. 19th.

A bill brought for an account and for an injunction to restrain proceedings at law, cannot be demurred to on the mere ground that the plaintiffs in equity are not all defendants at law.

THE demurrer, for want of equity, having been allowed, the plaintiffs filed their bill against Lee alone, charging him with specific acts of fraud in his accounts; charging also that the approval of Arcos was not intended by the contract to influence the price of the goods, but only to determine their quality and species; and praying discovery and also relief as before, except as to the delivery up of the patterns.

The defendant demurred to the bill, on the ground that the plaintiffs had stated no case entitling them to join as co-plaintiffs in the bill.

Mr. *G. Richards*, for the demurrer, contended, that the action not having been brought against Darthex the elder, who was at that time abroad, but only against his three co-partners, Darthex the elder was not affected by the judgment at law, so as to enable him to join as a plaintiff in this bill. He cited *Cardale v. Watkins* (a), and *Richardson v. Soares* (b).

Mr. *Temple*, and Mr. *Rogers*, for the bill.—The statute 3 & 4 Will. 4, c. 42, s. 8, precludes the defendant at law from pleading the non-joinder of Darthex the elder in abatement. Besides, he has a positive and direct interest in the action. The contract was made with the four; and though

(a) 5 Madd. 18.

(b) Nom. *Glyn v. Soares*, 3 M. & K. 450.

in form the judgment is against the three only, yet, under that judgment, the partnership effects may be taken in execution. Supposing there were any foundation for the objection, which there is not, it ought to have been made by plea.

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Mr. *Richards*, in reply, observed, that a plea for want of parties would not hold to a bill of discovery; that, in *Richardson v. Soares*, Richardson was as much interested as Darthez the elder could be; that Darthez the elder had only a collateral interest in the action, and was therefore to be considered as a stranger to the proceedings at law; and that it was a general rule that a bill for discovery in aid of a defence to an action could not be filed by a stranger to the action.

The LORD CHIEF BARON.—It appears to me that I must overrule this demurrer, which is founded on the mere technical objection, that the plaintiffs in equity are not all defendants at law. The cases which have been cited for the defendant depend on the principle that no party can file a bill for discovery unless he has some interest in the discovery; that a mere stranger, who on the face of the bill appears to have no interest, cannot maintain such a bill. No proposition can be more just. Another principle is, that a party to be entitled to file a bill of discovery must have had an action actually brought against him, or some reasonable ground to expect an action to be brought against him. That also, as a general proposition, is true; but it is not universally true—as, for instance, in the case of an action already on record. In such a case the rule does not of necessity exclude the introduction of another man as plaintiff, who, though no action is brought against him, has an interest in an equal degree with the parties against whom the action is brought. Suppose that in this

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case no action had been brought, but that there existed the apprehension of one; could it be contended that all the four partners were not entitled to join as plaintiffs in the suit in equity? Why, on the very principle that they might file a bill in apprehension of an action, it would be competent for them so to join. The question then is, whether, when an action is actually brought against three only out of four partners—and that for a reason appearing on the face of the bill itself—there is any strict rule of law by which the four partners are excluded from joining as plaintiffs in the bill? I am of opinion that no such strict rule of law can be found. In the case of *Richardson v. Soares*, Richardson could by no possibility be affected in interest, directly, by the judgment at law. If he had joined with Glyn in filing a bill for relief, the nature of his interest might have made him a necessary party. But that was a mere bill of discovery filed in aid of the defence to an action brought by the holder of certain bills against Glyn as the acceptor. How could Glyn's acceptance of those bills affect Richardson's interest so as to render him a necessary party to that bill? In the present case the judgment at law, though ostensibly and in name it might not affect Darthez the elder, yet would affect his assets. The execution of the judgment would have an immediate effect on his own property, and therefore he has a direct interest in defending the action. Besides, a partner has reason to apprehend other consequences from an action brought against his co-partners. Suppose Darthez the elder to be in this predicament—that no bill had been filed, no defence made to the action, and judgment obtained against the three; could not the plaintiff at law file a bill in this Court calling on Darthez to account for his assets, in order to make them liable; and would not the judgment be *prima facie* evidence that his assets were bound by it? Darthez, therefore, has an

interest in all the future consequences of the judgment; and surely, if there were any strict rule of law, as that which has been suggested, it would be necessary to relax it in his favour. But no such rule of law exists. It is a mistake to call that a strict rule of law which is only an illustration of a general principle. It appears, therefore, to me that Darthez the elder has a complete interest, as well as his co-partners, in the discovery sought by this bill; and, consequently, that there is no objection to his being made a party to the bill.

Demurrer overruled.

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Feb. 17th.
24th.

A PERSON of the name of Margrave, being possessed of some leasehold property at Shadwell, by an indenture dated the 15th of September, 1813, in consideration of the sum of 225*l.*, granted an annuity of 24*l.* 15*s.* to one Dunn, for the term of his life; and, to secure that annuity, demised the leasehold premises to Dunn, his executors, &c., upon trust, by selling or mortgaging the same, or by such other ways and means as to him or them should seem meet, to raise such sum and sums of money as should be sufficient to pay the annuity, and all arrears, and also all such costs, charges, and expenses (if any) as the grantee or his executors should sustain or be put to by reason of the non-payment of the annuity, or taking possession, collecting, and receiving the rents; and after payment and satisfaction thereof, to pay to or permit Margrave to receive the residue of the rents and profits to his own use. The annuity deed contained a clause of re-purchase.

Margrave regularly paid the annuity, and died in 1822,

A bill for an account of the rents and profits received by the grantee of an annuity in possession of the premises demised to secure the annuity, must contain an offer by the plaintiff, either to redeem in the terms of the deed, or to re-purchase upon equitable terms, to be settled by the Court.

A bill for an account of partnership transactions must pray for a dissolution of the co-partnership.

Generally, a bill for an account need not contain an offer by the plaintiff

to pay the balance if found against him.

Upon a bill for an account, evidence to shew on which side the balance lies cannot be used at the hearing.

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having bequeathed the leaseholds to Sarah Clegg, and appointed her his executrix. The annuity having become in arrear, Dunn entered into possession of the premises, and remained in the receipt of the rents and profits till his death.

The suit was instituted by the executors of Sarah Clegg against Dunn, and revived against the present defendant, who was Dunn's executor. The original bill, after charging that there was nothing due to the defendant Dunn, that he had been over-paid, and had refused to account, prayed for an account of the rents and profits of the premises, and of all payments for ground-rent, annuity, repairs, taxes, rates, and other outgoings; that the defendant Dunn might, upon taking such account, pay to the plaintiffs what, if any thing, he might appear to have been over-paid, and deliver up to the plaintiffs possession of the premises. The plaintiffs made no offer by their bill either to pay what might be found due from them on taking the account, or to re-purchase the annuity.

The defendant Dunn, by his answer, denied that he had refused to account with the plaintiffs, alleging, on the contrary, that he had delivered to them a written statement of his receipts and disbursements. He stated that he was still ready and willing to account with them, and that the annuity should be re-purchased. He set forth a schedule of his accounts, by which he made it appear that a considerable balance was due to him.

Mr. *Chandless* having opened the case for the plaintiffs, the Court asked on what authority this bill could be sustained, which contained no offer to pay the balance of the account if found against them?

Chandless then referred to the observation of Sir *John Leach* in *The Columbian Government v. Rothschild* (a),

and contended that it was not necessary on a bill for an account to make a specific offer to pay the balance.

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Mr. *Simpkinson* and Mr. *Moore*, for the defendant.—The dictum of Sir *John Leach* in *The Columbian Government v. Rothschild* is of very doubtful authority. A totally contrary doctrine was laid down by Sir *A. Hart* in *Hickon v. Ayloard* (a). In that case there was an original and cross-bill, and the cross-bill prayed an account without offering to pay the balance, in case it should appear to be against the plaintiff; and Sir *Anthony Hart* said—"The cross-bill, which as to *Dolphin* is an original bill, does not contain an offer to pay the balance if against the plaintiff; and where a bill for an account omits such an offer, Lord *Eldon* often decided that it would not do, and there are several cases in which supplemental bills have been filed; but I think I can, without putting the parties to the expense of filing a supplemental bill, allow them, although I cannot compel them, to go into the Master's office to assert their rights." The question, therefore, is not settled by the case before Sir *John Leach*; but even if it were, this is not a bill for a mutual account, as in the case of the *Columbian Government*. It is, in truth, an action by a mortgagor against a mortgagee. The leasehold premises were demised to the original defendant for the purpose of securing payment of the annuity and all costs and arrears; and by the terms of the deed, the annuity is made redeemable. The Court cannot order even payment of the arrears, for they are not personally due to the plaintiffs, but are a charge on the estate. Then, will your Lordship entertain this suit, the plaintiffs not undertaking to do what is equitable, by offering either to pay or to redeem? The Court cannot, on further directions, decree the plaintiffs to redeem. The plaintiffs cannot make that offer on this record. They

(a) 3 Molloy, 1.

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have chalked out their own course, and cannot, under the general prayer, ask such relief: *Palk v. Clinton* (a). [*Alderson*, B.—Cannot the plaintiffs amend their bill?] In *Field v. Delany* (b) liberty to amend was refused, and it ought to be refused here. This is a harassing bill: an account was delivered to the testator, and the defendant, in his answer, expresses his readiness both to account and redeem. The Court at the hearing does not in general give liberty to amend, except to add parties, or to correct some error in a date or a sum. [*Alderson*, B.—Are there not some cases of partnership that bear upon the point as to the plaintiff not offering to redeem?] Those cases are analogous to the present. The plaintiff in a partnership bill cannot pray for an account without also praying a dissolution. It must be admitted that Sir *John Leach*, in *Harrison v. Armitage* (c), decided the other way, but the authorities in general support that proposition. *Forman v. Homfray* (d), *Marshall v. Colman* (e), *Loscombe v. Russell* (f). The last of these cases goes much further than the present, and the judgment of the Vice-Chancellor is very much in point. He allowed the demurrer in that case, observing that the plaintiff purposely avoided a prayer for dissolution. Here, the plaintiffs purposely avoid an offer to redeem. [*Alderson*, B.—No doubt the objections to the bill in that case are very strongly put, in the Vice-Chancellor's judgment. I at first thought that the good sense of the rule was with Sir *John Leach*, on the ground of the hardship in dissolving a profitable partnership in order to get an account; but I am now disposed to think otherwise. Here, the party in possession is employed not merely in receiving the rents, but in doing repairs and paying the ground-rent. The balance between the parties may, as observed in *Loscombe v. Russell*, be

(a) 12 Ves. 48.

(b) 1 Molloy, 174.

(c) 4 Madd. 143.

(d) 2 Ves. & B. 329.

(e) 2 J. & W. 266.

(f) 4 Sim. 8.

turned each way a hundred times in the course of the suit.]

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Mr. *Chandless*, in reply.—This is a case in which the amendment, if necessary, should be allowed. If the objections which have been taken were fatal, the defendant would have demurred. On the contrary, he puts in an answer stating that he is willing to come to a fair and just account. After such a clear submission to account, ought the objections to prevail? It is said that there is no offer to pay, and no offer to redeem. Upon the first point, the proposition is not shaken, that a bill for an account carries with it an offer to pay the balance. Upon the second point, how does the case stand? Here, no doubt, there is a trust for the grantee, upon failure of payment of the annuity, to enter into the receipt of the rents and profits; but there is an ultimate express trust for the plaintiffs. How are they to get at the surplus, of which there is an express trust for them, without filing a bill for an account? Is the grantee, under such circumstances, to receive the rents and profits for twenty years, and not to be called on to account without an offer by the other party to re-purchase? This is an annuity, and not a mortgage; and the power is, in truth, to re-purchase, and not to redeem. In bankruptcy, the grantee of an annuity cannot prove for the original price of the annuity, but for that price reduced by subsequent diminution in its value. It is a mistake to say that the bill cannot be amended. Leave to amend is only refused where the party asks for relief inconsistent with the prayer of his bill—where, for instance, a party files a bill as a specific creditor, and, not being able to prove his case in that character, wishes to make himself a general creditor; but that does not apply where the general aspect of the bill remains the same. The partnership cases are scarcely applicable; but, admitting

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them to be so, the case of *Richards v. Davies* (a), which is later than any that have been cited, overrules *Loscombe v. Russell* (b), and that class of authorities.

The Court, at the conclusion of the argument, called on the plaintiffs' counsel to say, whether they would then undertake either to pay the balance, if found against them, or to redeem; to which they replied, they would undertake to pay, but not to redeem.

In the course of the cause, the defendant's counsel tendered proof that the defendant had not been overpaid; but that, on the contrary, a considerable balance was due to him.

For the plaintiffs it was contended, that such evidence could not be read at the hearing of the cause: *Walker v. Woodward* (c).

ALDERSON, B., was inclined to reject the evidence, but said, that, in the view which he took of the case, it was unnecessary to decide the question.

Feb. 24th.

ALDERSON, B.—In this case two points were reserved for consideration. First, it is objected, that, as the bill is framed, the plaintiffs cannot have the account prayed for, for that this bill contains no offer to pay the balance, if found against them. But, on looking at the cases, I think that this is not a good objection. The cases seem to establish that the prayer of an account is equivalent to an offer to pay the balance, if ultimately found to be against the plaintiff; and that, in case it be found against the plaintiff, the Court may, on further directions, decree against him that he do pay such balance. At any rate, as there is an offer at the bar on the part of the plaintiffs

(a) 2 Russ. & M. 347.

(b) 4 Sim. 8.

(c) 1 Russ. 107.

to do this, I should not allow this objection alone to deprive them of the remedy, but should permit them, if it were necessary, to amend their bill in that respect.

But there is a second objection. This is a bill to have an account of rents and profits of premises in the defendant's possession, which he holds under an annuity deed, to reimburse himself an annuity granted by the person now represented by the plaintiff. That deed contains a clause of redemption on certain terms. There is no offer to redeem on the terms of the deed, or even to re-purchase on such equitable terms as the Court might direct on inquiry before the Master.

Upon this it is contended for the defendant, that the jurisdiction of this Court is not to be used in favour of a man who does not offer to do complete equity; and that the present case may be compared to that of a partnership, where, it is said, the Court will not interpose, unless a dissolution is prayed. On that point there are contradictory decisions; the opinion of Sir *John Leach* being at variance with that of Lord *Eldon* and of Sir *Launcelot Shadwell*. As I am obliged, therefore, to consider the case upon principle, it seems to me that the reasons assigned by the two latter Judges are the more satisfactory, and that I ought to adopt their opinion. Then, what is the principle? It seems this—that, where there is an open account in which the antecedent items, respecting which the account in equity is sought to be taken, are necessarily connected with, and not capable of being severed from, the other items of the account which are to arise in future, the Court will not interpose; for if it did, it would tolerate the bringing of a suit, which could never come to an end till the account itself was closed; for the state of the account would be continually changing whilst it was under discussion and settlement. The party who seeks redress must put it in the power of the Court to close finally by its decree the dispute between

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the parties. As soon as he does this, he is entitled to its assistance. In the case of a partnership, therefore, he must pray a dissolution. In this case he must pray either a redemption on the terms in the deed; or, if time has made an alteration, at all events he should pray a re-purchase on equitable terms, to be settled by the Court. Neither has been done here, nor is the party now able or willing to do this. I think, therefore, that the bill must be dismissed with costs.

But I think, also, I must reject the evidence as to the account, on the authority of the cases quoted, and on the reason of the thing, which confirms Lord *Gifford's* authority. This will only be material as to the question of costs.

Decree accordingly.

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 Dec. 14th.
 1836.
 Feb. 25th.
 July 1st.

KNIGHT v. Marquess of WATERFORD and Others.

C 4-393 *Plaintiff's title to Eastern Rectory*
THE plaintiff was rector of the parish of Ford, in the county of Northumberland, and the Marquess of Waterford was patron of the rectory of Ford, and also lord of the manor of Ford, and an owner and occupier of land within the rectory.

In the year 1830 the plaintiff filed his bill in this Court against the Marquess of Waterford, and several other persons his tenants, being occupiers within the rectory of Ford, for an account and payment of the great and small

In a suit for tithes instituted by a rector against a party who was both patron of the rectory and lord of the manor in which the land for which the tithes claimed were situate, suggesting that a customary payment of 40*l.* per annum, alleged by the defendant

to have been made from time immemorial in lieu of all tithes, was founded on a series of corrupt contracts by way of resignation bonds and otherwise, between successive patrons and rectors :—Held, upon a supplemental bill of discovery filed by the rector, that the defendant was bound to produce all such private documents in his custody relating to the matters inquired after by the bill as did not constitute his title to the inheritance of the manor, or the lands of which the tithes were claimed, or the inheritance of the tithes.

The plaintiff is not bound by the defendant's construction of documents in his possession (not his title deeds), if it be clear from the circumstances that they may relate to the plaintiff's title.

tithes of the land in their several occupations. To that bill, the Marquess, who was then a minor, put in an answer by his guardian, stating his belief that the manor of Ford, containing eight thousand acres, had been from time immemorial comprised within the parish of Ford, and that there had been payable from time immemorial by the lord or owner of that manor for the time being, by equal half-yearly payments, to the parson of the parish of Ford for the time being, the yearly sum of 40*l.* for the maintenance of divine worship there, in lieu of all manner of tithes arising &c. within the manor of Ford; and that the lord or owner of that manor for the time being, or his assigns, had from time immemorial been entitled in respect of the said yearly sum of 40*l.*, to all the tithes within that manor, or any part thereof. The defendant made no answer to a charge contained in the bill, as to deeds and documents in his custody.

The Marquess of Waterford having come of age, the plaintiff filed a supplemental bill of discovery against him and the other defendants, suggesting that the lords of the manor of Ford, who were patrons of the rectory, and under whom the defendant, the Marquess of Waterford, claimed, used to take bonds from persons about to be presented to the rectory, conditioned for the acceptance of an annual sum of 40*l.*, in satisfaction of the tithes within the manor of Ford; that when no such bonds were given, the rectors, soon after their induction, used to make leases of those tithes to the lords of that manor, and that 40*l.* a-year, or some such annual sum, was the rent reserved on such leases; that at all events, by some instruments or agreements, the sum of 40*l.* was fixed as the whole amount to be received by the rectors from the lords, for the tithes within the manor of Ford, or parish of Ford; and that the 40*l.*, alleged by the Marquess to be an immemorial customary payment, had its origin in such bonds and leases, or other instruments or agreements. The bill then con-

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tained other statements impeaching the defence to the original bill, namely, that, about the year 1573, a claim was made and a suit instituted in respect of the tithes within the manor of Ford, by the then rector against the then lord of the manor; that a decree was made, referring the matters in dispute to arbitration, and that an award was made establishing the rector's right; that a considerable district, called Catford Law, formerly belonging to the lords of the manor of Ford, and being part and parcel of that manor, and held as such, was, about the year 1660, sold by the then lord of the manor to a family of the name of Carr, and that the occupiers of that land had ever since paid tithes to the rectors of Ford; that another district, called Heatherslaw, situate within the parish of Ford, and forming part of lands for which the 40*l.* was claimed to be paid in lieu of tithes, was formerly a manor of itself, and paid tithes in kind to the rector until purchased some time between 1685 and 1717, by the then lord of the manor, after which time the tithes of Heatherslaw were introduced into the leases, bonds, and other instruments, whereby the sum of 40*l.* was received by the rectors of Ford, in lieu of the tithes of the lands, the property of the lord of the manor of Ford.

The bill then alleged that the defendant, the Marquess of Waterford, had in his possession, custody, or power, divers of the before-mentioned bonds, leases, or other instruments and agreements, and also the before-mentioned award; and also divers old deeds, instruments, and writings, including the deeds of conveyance, or some of them, or some copy of or extract from or abstract of them, or some of them, proving the allegations in the bill respecting Catford Law and Heatherslaw; and also divers other deeds, papers, and writings, which would shew that no such immemorial payment of 40*l.* existed, or which would in some way tend to shew the plaintiff's title to tithes in kind within the manor of Ford.

The Marquess, by his answer, admitted that Catford Law formed part of the manor of Ford, and had been sold as stated by the bill, and that since such sale the occupiers of it had paid tithes to the rector; but he alleged that this was in order to avoid litigation. He stated, that he had not in his possession the conveyance deeds of Catford Law, but that he had those of Heatherslaw, and that they were included in the second schedule to his answer. He denied the other material allegations of the bill. In answer to the general charge as to deeds and documents, he alleged in substance as follows:—That he hath in his possession divers deeds and evidences of title, papers, and writings relating to the tithes of the parish of Ford, but that such deeds, &c., all relate to his, the defendant's, title to the said manor or the lands therein, or the tithes thereof, and that the same do not relate to the plaintiff's title to any tithes whatever within the parish or manor; that he hath, in the first part of the second schedule to his answer annexed, and which he prays may be taken as part thereof, set forth, according to the best of his knowledge, a full and true list and description of such deeds, &c., as are so in his possession; that he hath in the second part of the second schedule, &c., and which he prays, &c., set forth a full and true list and description of divers deeds, &c., which relate to the tithes of the said manor; (but which are not in the defendant's possession or power, except that he or his agent may have an inspection thereof at his bankers'); that the deeds, &c., so deposited with his bankers, all relate to the defendant's title to the said manor or the lands therein, or to his right and title to the tithes of the said manor, and that the same do not relate to the plaintiff's title to any tithes whatever within the said parish, or within the said manor; that the plaintiff is not, as the defendant submits and insists, entitled to the production, either in this Court or otherwise, of all or any of the

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deeds, evidences, papers and writings, comprised in either the first or second parts of the second schedule:

The answer then contained a denial that the defendant had ever had in his possession the bonds, leases, and other instruments inquired after by the bill, if any such ever existed; or save, as appeared by the second schedule, any papers or writings relating to the payment of 40*l.*, or any other sum in lieu of the tithes mentioned in the bill.

A motion was now made on behalf of the plaintiff for the production, in the usual manner, of the deeds and documents mentioned in the first part of the second schedule of the answer, and that the defendant might procure for the plaintiff an inspection of the deeds and documents mentioned in the second part of the second schedule.

Mr. Boteler, and Mr. Lowndes, for the motion.—The plaintiff cannot call upon the defendant for the production of such documents as constitute the defendant's title to the inheritance in the manor or the tithes, nor does he ask for the copies of public documents; he therefore confines his application to such documents as are collateral to the title, and not of a public nature. The cases establish that distinction: *Firkins v. Lowe* (a), *Collins v. Gresley* (b), *Newton v. Beresford* (c). The plaintiff has a right to inspect these documents, and to submit to the Court that the defendant's construction of them is wrong. He is not bound to take the defendant's word that they speak only in favour of his own title. The right to the inspection is fully admitted by that passage of the answer which alleges "that save, as appears by the second schedule," the defendant has no documents relating to the matter in issue.

Mr. Swanston and Mr. Purvis, contra.—The plaintiff has

(a) M'Clelland, 73.

(b) 2 Y. & J. 490.

(c) 1 Younge, 377.

not shewn upon the answer a sufficient title for the production of these documents. On the contrary, it is expressly denied by the answer that they relate to the plaintiff's title; and *Bligh v. Berson* (a) shews that the defendant's construction in this respect will be adopted by the Court. That case was recognised in *Hardman v. Ellames* (b). The plaintiff ought in general to shew some interest in the documents he seeks to have produced; but here, as rector, he has a common law title which cannot be affected by deeds and documents. In *Sampson v. Swettenham* (c), Sir John Leach refused to order the production of a deed which gave the defendant title, but which was not connected with the plaintiff's title. [The Lord Chief Baron.—The object here certainly is not to establish the plaintiff's title but to impeach the defendant's.] There is no authority for this application. In two of the cases cited, the motion was for the production of the vicar's books; but they are public documents, which the tithe-payers have a right to inspect, in order to see what payments have been made by their ancestors. *Glegg v. Legh* (d) is an authority against the present motion, though the demurrer in that case was held to go too far, and was therefore overruled. [The Lord Chief Baron.—But it appears from the Vice-Chancellor's observations in that case, that if the defendant had confessed by the demurrer that he had in his possession a copy of the deed by which he had conveyed the tithes to another person, that would have shewn he had no title; and though the plaintiff could see nothing else, yet they might see, if they could get at it, the deed by which the defendant had conveyed his right away].

Mr. Boteler replied, contending that the bill sufficiently charged that the defendant had documents in his posses-

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(a) 7 Price, 205.

(b) 2 M. & K. 745.

(c) 5 Madd. 16.

(d) 4 Madd. 193.

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sion which disproved his case, and that those charges were not met by an answer denying generally that the plaintiff had an interest in the documents.

The LORD CHIEF BARON.—I have fluctuated much in my opinion in the course of the argument, because I wished to see if there was any case of a rector who had been able by a bill of discovery, or under the authority of this Court, to compel a defendant to produce documents which did not in fact tend to advance the rector's title, but to defeat that of his antagonist. The case cited by Mr. *Purvis*, and decided in the year 1819, was that of a rector's book. The bill was filed by a rector, and upon an application for that purpose the Court refused to compel the defendant to produce the book of a former rector, which was supposed to have found its way into the hands of that rector's executors, and thence into the possession of the defendant. Now, if I considered the present case exactly like that, I should of course follow that precedent; but it strikes me, upon looking at the whole of this case, that the plaintiff is entitled to some discovery. The general rule in these cases is, that the defendant shall not be compelled to produce his own title deeds, but that rule is very much confined to title deeds relating to real property. I do not mean to say that title deeds of tithes would not fall under that head; but in a case where the rector files his bill, and his *primâ facie* title to the rectory is admitted, but the thing put in issue is, whether his right to receive tithes in kind has been modified or defeated by some custom or conveyance in former time, and entitles him only to 40*l.* a year, it cannot be denied that all the matter which establishes that must have a very great relation to his title. It is proposed to modify this motion so as to exempt all those deeds that appear upon the schedules to relate to the defendant's title to the manor, or to the lands, or to any title of inheritance, and to apply it only to those

sorts of documents which are surmised by the bill to refer to certain contracts between the rectors and the patrons for the time being, under which the custom as to this 40*l.* is said to have grown up. Now, if there be any documents in existence that would throw any light on the origin of that custom, and if at the same time I should say that the rector is not entitled to have a discovery of those documents, what would be the result? That on the hearing of the cause the defendant would not produce those documents, but only such as might prove the custom without any qualification. I think, therefore, that justice requires that the motion, as modified, should be granted. The mere opinion of the defendant that the documents do not relate to the plaintiff's title, cannot alter the case; because it is quite clear they do relate to his title if they have relation to the tithes at all.

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It was ordered that the defendant should within a given time produce for the inspection of the plaintiff and his agents the several deeds, evidences, papers and writings, mentioned in and referred to in the first part of the second schedule of his answer, except the deeds, evidences, papers and writings, forming the title to the inheritance of the manor of Ford, and lands, the tithes of which are claimed to belong to the defendant: and except the deeds, evidences, papers, and writings, forming the alleged title to the inheritance of such tithes: and except also the copies of documents in public courts or depositories for writings. Liberty to the plaintiff and his agents to take copies of or extracts from the documents so to be produced.

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Upon a rector's bill for tithes, and a supplemental bill for discovery of documents impeaching the defence, *held* that the defendant was not bound to produce certain old briefs in his possession, in order to prove the plaintiff's allegation that a former rector's bill, which had been met by the same defence, was dismissed in consequence of collusion between the parties.

Held, also, that the defendant was not bound to produce certain leases which had been granted by his predecessors of the lands for which the tithes were sought.

A plaintiff is not entitled to the production of documents which cannot, from their nature, be evidence of his title, though they may impeach that of the defendant.

THE defendant not having produced, as the plaintiff conceived, all the documents which he was bound to produce under the foregoing order, a motion was now made for the production of all the briefs and a number of leases (apparently leases of lands within the manor, and occasionally of the tithes) comprised in the first part of the second schedule of the defendant's answer. The briefs appeared to relate to a variety of suits; but among them was a suit instituted in Chancery, in the year 1683, by Jenkins, who was lessee, under the rector, of the tithes of part of the lands now belonging to the Marquess of Waterford, against Blake, who was then lord of the manor of Ford. In that suit the same defence was made as on the present occasion, and the bill was dismissed. It did not appear from the Register's book that that decree was taken by consent, nor on the other hand, though the names of several counsel were mentioned, that any evidence was read at the hearing. The object of obtaining the briefs was to find out under what circumstances that bill was so dismissed.

Mr. Boteler, and Mr. Lowndes, for the motion.— There is reason to believe that in the suit of *Jenkins v. Blake*, the plaintiff examined several witnesses who completely disproved the defence there set up, which was the same as the present. Why the evidence in that case was not read, does not appear; but if, as suggested by the bill, the rectors were in the habit of giving resignation bonds, that circumstance would operate to prevent them from enforcing their demands. The briefs might throw considerable light upon these matters. [The Lord Chief Baron.—What use could you make of a brief in evidence?] The observations on a brief are the statements of the party who delivers the brief; they are his declarations. Suppose a defendant in a tithe suit to have declared that he held the tithes upon lease, but that he was anxious that the lease should assume the

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appearance of a modus; that declaration would be evidence against him. Suppose, again, instead of making a declaration, he had given instructions to counsel for drawing his answer to that effect, and the answer had been filed; would not that be evidence against him? [The *Lord Chief Baron*.—Instructions to counsel to consent would be evidence to shew how it happened that a cause had been so disposed of; and so far they would be evidence against him. I doubt, however, whether any other instructions would be evidence against him. They are drawn up by his attorney. According to some recent decisions, cases stated for the opinion of counsel may be ordered to be produced for the inspection of the opposite party. But I doubt the authority of those decisions. In the older cases on this subject, the party seeking the production of such statements had a direct interest in them.] A case stated for the opinion of counsel may lead the party to the sources of evidence. Though not itself evidence, it may be valuable for the purposes of discovery. [The *Lord Chief Baron*.—Then you are not at liberty to ask for your opponent's title deeds, but you are at liberty to ask for the case which may disclose his whole title. I am aware that a case has been sometimes ordered to be produced without the counsel's opinion; as if that made any difference. Is there any principle in that? In the recent case of *Bolton v. Corporation of Liverpool* (a), it was decided by the Vice-Chancellor that two cases laid before counsel many years since, by the town clerk of the corporation, might be produced for the inspection of the plaintiff. I had an opportunity of investigating the authorities on which that decision was made, and I found that they were all cases

(a) Heard before the Vice-Chancellor on demurrer, 24th of May, 1831, when the demurrer was overruled. The defendants appealed from this decision, and the case was heard before Lord

Brougham, on the 29th of August, 1831, when his Lordship affirmed the Vice-Chancellor's decision. The case upon demurrer is not reported.

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in which the party seeking the production had a direct interest in the documents sought for. I recommended an appeal to the Lord Chancellor, who was struck with the reasons for the appeal, but thought himself bound by the authorities to confirm the Vice-Chancellor's decision. I cannot see, however, how these cases could, under the circumstances, be evidence against the corporation.] At all events, if the plaintiff is entitled to the cases, he is entitled to the briefs. In the case mentioned by your Lordship, Lord Brougham considered a case and a brief in the same light. Now here, one or two cases have been produced by the defendant, in which the case of *Jenkins v. Blake* is adverted to, and it is stated that no evidence was given by the plaintiff. The fact is, however, that the plaintiff examined eight witnesses. It may be material, therefore, for the plaintiff to shew that the party must have known the statement to be false, and that it was made for fraudulent purposes. An order might be made for the production of the briefs with the exclusion of particular parts. As to the leases, they are not amongst the deeds excluded by the order, not being title deeds affecting the inheritance in the lands and tithes. It appears in some of the early leases, that the tithes were not leased with the lands; and it is material to the plaintiff to see how the variation in that respect arose.

Mr. *Swanston*, and Mr. *Purvis*, contra.—There is no case in which the production of briefs has been ordered by a Court of equity under circumstances like the present. Upon what principle does the plaintiff apply for their production? On the sole ground that they *may* be evidence in his favour: but that alone is not a sufficient reason for their production. If the bill in *Jenkins v. Blake* had been dismissed by consent, it would have so appeared by the decree. If it was not dismissed by consent, (and by the form of the decree it may be inferred that it was

not), the briefs in question cannot be admitted in evidence to contradict the record. [The *Lord Chief Baron*.—Suppose a decree made many years ago, apparently not by consent; might not living witnesses be called to prove that the decree was collusive, and that the cause was never heard? I remember a case in which a decree made a hundred years ago, was proved to have been collusive. The suggestion here is, that a succession of payments of 40*l.* have been obtained by a succession of collusive acts between the patron and the rector, and that statements have found their way into a Court of equity for the purpose of giving colour to the patron's right. Now, if the plaintiff could shew that one mode of attempting to establish that right was to file a bill and get it dismissed, as if upon the merits, would not that be evidence to shew a systematic plan of accumulating evidence for that purpose?] The records must speak for themselves. There is no suggestion in the bill that any fraud was practised upon the Court in this case. In a case like that of the *Duchess of Kingston* (a), evidence might well be admitted to shew that the judgment of a Court had been obtained collusively, but not in a case like the present, where the bill makes no charge, and the parties give no evidence whatever of fraud in obtaining the decree. If there be no ground for such a suggestion, is a note on the brief of counsel to be admitted to impeach the record? The observations of Lord *Brougham*, in *Bolton v. Corporation of Liverpool*, are peculiarly applicable to this case. "The plaintiff," says his Lordship, "does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can these documents prove his title? Only by disclosing some de-

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(a) 20 How. St. Tr. 358.

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fect in the corporation." In a subsequent part of his judgment he treats the production of a brief as a proposition too absurd to be thought of; and observes, that if such a practice was allowed, no man would be safe. In the present case, the Court is called upon to presume that the briefs contain evidence that the decree in a certain cause was obtained by fraud. Having made that presumption, the Court is to frame an order under which that may be proved to be true, which has been already presumed to be true. Why should the Court make any such presumption? Besides, the production of documents of this nature leads to this result—that although what a client states to his solicitor cannot be used in evidence against him, yet, if the solicitor take the statement in short hand, and copy it out and lay it before counsel, it will in that shape be evidence against the client.

With respect to the leases, the production of them, if it assisted the plaintiff at all, could only do so by means of impeaching the defendant's title. We do not dispute that a plaintiff in a Court of equity is generally entitled to a discovery of documents which aid his title; but there are several exceptions to the rule. One exception your Lordship has already acted upon, in not allowing the production of the defendant's title deeds. Another is, that the plaintiff has no right to call on the defendant to give any evidence of his title for the mere purpose of impeaching it. Now, the sole object of the plaintiff in calling for these leases must be to impeach the title of the Marquess as lessor. Besides, leases are muniments and evidences of title. Suppose the property had descended from heir to heir for a long series of years, the leases would be evidence of the possession and freehold. It is said they do not convey the freehold, and therefore are not within the exception to the order; but that argument would apply to a lease for a year.

Mr. Boteler, in reply.—Instructions given to counsel are not in the nature of confidential communications. Besides, the notes of counsel on the briefs, though not in themselves evidence, may lead to the production of most material evidence. The notes of counsel are not confidential. This is altogether a new species of case. Such a series of collusion as the bill suggests is seldom offered to the consideration of a Court. The decree in *Jenkins v. Blake*, as it stands, is not in the usual form, and on the face of it leads to a suspicion that no evidence was read at the hearing of that cause. The leases do not concern the title, but only shew how the persons in possession dealt with the land.

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The LORD CHIEF BARON.—When this case was first before me, I was not insensible to the argument that the title of the rector to tithes was simply his possession of the rectory, and that he had no occasion to seek any other evidence of title, and that the onus of proving that he had no title rested on the defendant. But it appeared to me that the defendant, who claimed the tithes in this case, being the patron, probably could claim them under the rector only, and therefore might have documents in his possession forming part of the evidence of the rector's title; and, as far as the plaintiff's motion extended to such evidence, I thought it only reasonable that he should have it, but that I should protect the defendant from producing the evidence of any title paramount to that which the rector might claim. Now, it seems from certain cases that have been already produced, that proceedings have taken place, more than a century since, between the rector and the patron, in respect of these tithes, and the plaintiff now calls upon me to make a further order for the production of the briefs in a cause which was either consented to or adjudicated in this matter more than a hundred years ago, and also for the leases which have been granted by the

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defendant and those under whom he claims, to the occupiers and tenants of the property for which the tithes are sought. Now, no case has been cited where a party has been held to be bound to produce a brief upon a bill of discovery filed against him. It is dangerous to lay down a universal rule upon the subject. I can imagine a case where it might be necessary to order the production of a brief, but it must be a strong case. What has been stated for the plaintiff furnishes evidence sufficient to dispose of the decree, to which allusion has been made, without ordering the production of the briefs in that cause; and I think that the argument which has been urged on the other side is just, namely, that I am necessarily called upon to presume collusion, in order to allow of their production. If a brief could be made evidence in support of the plaintiff's title, that might be a ground for its production; but it cannot be used as evidence. I can see nothing of this sort which can be evidence for the plaintiff, unless it were instructions to counsel on the back of the brief, to consent. I do not see that I can carry it further than that; and I shall not make a precedent for so doing. Even the cases in which consent briefs have been produced have been considered as of doubtful authority.

Then as to the leases, they are undoubtedly evidence of the defendant's title. I do not see what use the plaintiff could make of them. All he could do would be to throw a doubt on the defendant's title. To shew in what way the patrons have granted those leases is not material to the plaintiff's case. I think, therefore, that I cannot comply with this application. The plaintiff has already had quite as much assistance as he ought to have.

Motion refused.

AFTER the preceding motion had been disposed of, some further deeds and papers were discovered by the agent of Lord Waterford; upon which his Lordship, having obtained an order for that purpose, filed his supplemental answer, with two schedules annexed, setting forth a list of all the documents in the defendant's custody. Some of these had been already produced, the others the defendant objected to produce. Amongst the latter documents were the following; namely, certain letters stated in the schedule to be confidential, and apparently written by solicitors to their clients, owners of the manor, in relation to former suits for tithes within the manor of Ford; court-rolls for the manor of Ford during the year 1658, and several succeeding years; maps, described as seventeen old maps or plans, and surveys of several parts of the Ford estate, and a modern map of the Ford estate; and the answer of J. H. Delaval, formerly a lord of the manor, to a bill in Chancery, brought by George Marsh, clerk.

Mr. Boteler, and Mr. Lowndes, now moved for the production of the documents above specified, observing that the question as to the confidential letters must be put upon the same footing as that of cases submitted for the opinion of counsel. Upon that point they cited *Radcliffe v. Fursman* (a), *Preston v. Carr* (b), *Beresford v. Newton* (c), and *Bolton v. Corporation of Liverpool* (d); and observed, that in the latter case Sir L. Shadwell, and afterwards Lord Brougham, had taken a distinction between old and new cases, and that the same distinction was admitted in

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Cases stated for the opinion of counsel, whether of old date, or made with reference to or in contemplation, of an existing suit or action, are not evidence against the party on whose behalf they are stated, or whose interests they affect; therefore, if they tend to impeach that party's title, he is not compellable by suit in equity to produce them.

Confidential letters between solicitor and client are similarly protected.

Upon a bill by rector for tithes against a lord of a manor who claims tithes within the manor, the defendant may be ordered to produce old maps of the manor, and also the court-rolls, unless they relate to the title of his own lands within the manor.

An answer to a former bill for the same matter, though not filed, is to be deemed a public document, unless the contrary be shewn; if, therefore, it relate to the plaintiff's title in an existing suit, the defendant, in whose custody it is, will be ordered to produce it, unless he can swear that it was not intended to be used as an answer.

(a) 2 Bro. P. C. 514. Toml. Ed.

(b) 1 Y. & J. 175.

(c) 1 Younge, 377.

(d) 3 Sim. 467; 1 M. & K. 88.

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Hughes v. Biddulph (a), *Vent v. Pacy* (b), *Garland v. Scott* (c). [The Lord Chief Baron.—I do not think it material whether such communications relate to a cause now in progress, or to matters which took place on former occasions. In *Bolton v. Corporation of Liverpool*, Lord Brougham was, I believe, of that opinion, but thought himself bound by the authorities to adhere to the distinction.]

Mr. Swanston, and Mr. Bagshawe, *contrà*, objected to the production of the letters, and cited *Bligh v. Bereson* (d), *Wilson v. Foster* (e), *Purcell v. Macnamara* (f), *Greenough v. Gaskell* (g), *Richards v. Jackson* (h), *Aldridge v. Heathcote* (i). They also cited and commented upon Lord Brougham's judgment in *Bolton v. Corporation of Liverpool*, observing, that although his lordship adhered to the distinction which had been drawn by the Court below between old and new cases submitted to counsel, yet his reasoning was applicable to both sorts of cases; that in fact the distinction was quite arbitrary, and disclosures equally dangerous might be made in one case as in the other. [The Lord Chief Baron.—Some years ago the Corporation of Liverpool brought an action against a freeman of the city of London to recover certain toll dues. The case, which was a very important one, was tried at bar. At that time the Corporation of Liverpool had a town clerk of the name of Brown, who had a high notion of the antiquity of that corporation, and also of his own learning, and upon that occasion he laid a case before counsel, stating that the town dues existed by prescription. The Corporation of Liverpool succeeded in their

(a) 4 Russ. 190.

(b) *Id.* 193.

(c) 3 Sim. 396.

(d) 7 Price, 205.

(e) 1 M'Clel. & Y. 274.

(f) Wigram on Discovery, 209.

(g) 1 M. & K. 98.

(h) 18 Ves. 472.

(i) 1 Madd. 236.

action, but in point of fact it was not their title which was tried, but the right of the freemen of London to resist the payment. Afterwards, when the corporation brought their action against Bolton, he having obtained some notice of this and another case of a like nature, filed his bill for the purposes of getting a discovery of those cases, his object being to shew the inconsistency of the corporation in claiming their tolls on each occasion in different rights. The Vice-Chancellor decided that those cases might be produced. The defendants, by my advice, appealed from that decision to Lord *Brougham*, but he dismissed the appeal (a). I own I think that case went too far. Communications of that nature are strictly privileged. You are aware that Lord *Hardwicke* held, that the same privilege which a client had as to confidential communications with his solicitor, extended also to a conveyancer, in regard to title deeds. That opinion was brought into question before Lord *Tenterden*, who, on one or two occasions, did not regard it, but latterly thought it was right.] The counsel for the defendant then contended, that the other documents sought for ought not to be produced: the court-rolls, because they formed part of the defendant's title, and if they could in any way evidence the title of the plaintiff, it ought to have been so charged in the bill; the maps, because they were protected from production by the terms of the order; and the answer, because it was a private document, which had not been filed, or even signed. They also said, that it was not sufficient for the plaintiff to shew that the documents related to the matters in the bill, without shewing also that they related to the plaintiff's title: *Chapman v. Severn* (b).

Mr. *Boteler*, in reply.—If a plaintiff calls for the production of a title deed, he must shew that it relates to

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(a) See ante, p. 31, note (a).

(b) Not yet reported.

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his own title; but a similar rule does not apply to other documents. The plaintiff here is entitled to the production of the court-rolls and maps, on the authority of *Firkins v. Lowe* (a). Upon the subject of the production of cases and confidential communications, *Stanhope v. Roberts* (b) is in point. [The *Lord Chief Baron*.—There, Roberts prepared the deed for both parties.] But Lord *Hardwicke* in that case, approved of the prior decision by Lord *King*; and Lord *Eldon*, in *Richards v. Jackson*, acted on those authorities. The distinction between old and new cases is a sound one. If these communications had been made in contemplation of the present, or even of any similar suit, they might have been protected; but, as it is, they are not entitled to protection. [The *Lord Chief Baron*.—The privilege of the solicitor is the privilege of the client. It would be worth nothing, if you could file a bill against the client and make him disclose what the solicitor cannot.]

THE LORD CHIEF BARON.—It is disagreeable to be called upon to review the decisions of eminent persons, but, if I am bound to give an opinion, I must say that the order to produce confidential communications in respect to matters of fact relating to a party's title, have proceeded upon a principle which it is not necessary to extend. Many of the cases which have been cited for the plaintiff do not go the length contended for; certainly not the case in *Vesey*, because there both parties were interested directly in the motion; and, under such circumstances, that case and others have established a precedent which we cannot overcome. As to the decision of Lord *Brougham* and of the Vice-Chancellor, I should say, that the statement for counsel which they ordered to be produced, was as much protected as that which they refused. What is

(a) *McClell.* 73.(b) 2 *Atk.* 214.

the principle upon which these cases depend? The reason why Courts, both of law and equity, refuse the production of confidential communications is, not for the advantage of the attorney, but the privilege of the client. A man, *inops consilii*, goes and states his case to his solicitor on the very ground that it will not be revealed; but all such confidence will be destroyed, if it be known that a statement of that nature can be revealed at any time. A bill of discovery is in aid of the plaintiff in establishing *his* title, even in cases where it may depend upon the defendant's having none; but it is not established that an inquiry may be made by the plaintiff as to the defendant's title. Would it be endured that a bill should be filed in a Court of equity suggesting that a defendant had in his custody a deed which was not duly stamped, and which was, therefore, void, and ought to be discovered? Then, if you cannot ask for the defendant's title deeds to discover the defects of his title, by the same reasoning you cannot ask him to disclose what he has said to his counsel or attorney respecting those defects. The cases have been pushed to a length which the circumstances upon which they were decided will not justify.

Let us consider in their order the several documents in question.—First, as to the maps: they can be no evidence of the defendant's title, but they may possibly be evidence of the extent of the manor, and may therefore throw some light on the plaintiff's claims. They can be no evidence to establish the defendant's right either to the manor or the tithes; and therefore his saying that they relate to his title, and not to the plaintiff's, is not sufficient.

Next, as to the court-rolls; if they had constituted the title of the defendant to any particular land which he had in the manor, then he would not be bound to produce them; but I consider them only as a collection of court-rolls which he holds for the benefit of others. In one sense, no doubt, they may be evidence of his title; but if

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you file a bill of this nature against the lord of the manor, it is not sufficient for him to say I have the court-rolls, but they are evidence of my title, and therefore I will not produce them, for they do not relate to the defendant so as to prejudice his title.

Then, with respect to the answer: that is not a confidential communication; it was meant to be exhibited publicly. If the defendant had gone further, and said it was an answer which he had projected, but which he had afterwards resolved not to make, that would have been another thing. But, I consider that a bill relating to these tithes had been filed, and that this was an answer to that bill. The defendant himself states it relates to the matters contained in the plaintiff's bill. That, therefore, is not to be considered a private document; it was prepared for the Court; and unless it had been shewn in evidence that it had been matter of doubt whether it should become public or not, I do not see how he can refuse to produce it.

Then as to the letters; I think Mr. *Boteler* has gone further in support of the production of those documents than this particular case required. They are stated to be confidential letters between client and solicitor. If they had been stated as relating to the defendant's title, I should have said they ought not to be produced; but, as it is, it may be a question whether or no they are not confidential letters relating to the means by which the rector, whether by resignation bonds, or otherwise, was prevented from claiming his title; in such case they do not relate to the defendant's title, but to the plaintiff's. I shall order their production, saving as they relate to the defendant's title as communicated to his solicitors. These, I think, he is not bound to produce.

Motion granted as to the court-rolls, maps, answer, and (so limited) as to the letters.

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HAYWARD *v.* CONSTABLE and Another.

Feb. 25th.

JAMES ROBINSON, by his will, dated 27th August, 1832, bequeathed various legacies and annuities, amongst which was an annuity of 20*l.* to the plaintiff, Mary Hayward; and he appointed the defendants his executors. Upon the testator's decease, which took place in 1832, probate of this will was litigated in the Ecclesiastical Court, and an appeal was made to the Privy Council; but the will was ultimately established, and probate granted to the defendants in June, 1835. On the 2nd February, 1836, the plaintiff filed the present bill against the executors, charging that they had admitted assets sufficient to pay one moiety of the legacies, and had in December last offered to pay her one-half her annuity in the following January, though, in fact, they had paid her nothing; and praying that an account might be taken of the testator's assets, that the annuity might be secured for her benefit, and the arrears paid.

Where a decree had been obtained in Chancery for the general administration of a testator's assets, a bill previously filed in this Court by an annuitant under the will against the executors was dismissed; and as the annuitant's bill had been filed with undue haste, she was not allowed the costs of the application to stay proceedings, although she was allowed her costs up to the time of notice of the decree.

On the same day on which this bill was filed, the plaintiff's solicitors wrote to the defendants' solicitors, stating that they had instructions to file the bill, and requesting them to appear and accept subpœna. An answer was returned on the following day, stating that the defendants' solicitors had written to their clients, and the moment they received their reply, they would write again to the plaintiff's solicitors. On the 11th February, they wrote again to the plaintiffs' solicitors, stating that the plaintiff's suit was unnecessary, as the residuary legatees had already filed a bill in Chancery against the executors, to which the latter had put in their answer; and that, as that suit comprehended all that was sought by the plaintiff's bill, no further steps on her part were necessary.

It appeared that the bill in Chancery was filed on the 8th February; that the answer of the executors was filed

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on the 11th; and that on the 12th, a decree was made at the Rolls for a general administration of the testator's assets.

A motion was now made that all proceedings in the suit in this Court might be stayed, in consequence of the decree in Chancery, the defendants' solicitor stating upon affidavit that he believed the plaintiff well knew that the executors had been hindered from administering the estate in consequence of the litigation in the Ecclesiastical Court, she having been a witness against the will on that occasion. The defendant had tendered the costs of the proceedings in this Court up to the present motion, but that offer had been refused.

The plaintiff's solicitor, in opposition to the motion, swore to his belief that the suit was an amicable suit, and had been instituted in consequence of the suit in this Court.

Mr. Barber, and Mr. J. Russell, for the motion.—It is laid down in *Pott v. Gallini (a)*, that, where there is a prior decree, and a second suit for the same accounts and no further relief than can be had before the Master in the first suit, the proper course is to move that the proceedings in the second suit may be stayed, and that the plaintiff may go before the Master in the first suit. Now, here, a decree has been obtained by the executors sufficiently comprehensive to give the plaintiff that relief which she requires. The circumstance that her suit was instituted first, is immaterial; nor is it material that the suit in Chancery was instituted at the instance of the defendants. It is every day's practice for executors to file a bill to restrain harrassing actions, and the same principle applies here. There is no suggestion that the executors were guilty of neglect. Besides, the Court will not stop the suit of residuary legatee at the instance of another legatee. Many

(a) 1 S. & S. 209.

more inquiries will be made in that suit than in this. Costs of the proceedings here have been tendered up to the present time; in a common case the plaintiff would have a right to costs up to the time of notice of the decree.

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Mr. G. Richards, and Mr. Wood, *contrà*.—The plaintiff has an advantage in this suit which she would not have in the suit in Chancery. Generally speaking, a decree operates as a judgment for all persons who have a benefit under the will. But, here, the plaintiff stands much in the same situation as a creditor at law who has obtained judgment *de bonis propriis* against the executor, in which case a Court of equity will not restrain execution: *Terwest v. Featherby* (a). The plaintiff has filed her bill, to which the defendants have put in an answer, admitting assets sufficient to pay a moiety of the legacies and annuity. She has a right, therefore, to move that the money be brought into Court, and that the fund be set apart to meet her annuity. She prays that relief by her bill. Besides, the decree in Chancery has been obtained by a mere manœuvre, the defendants' solicitors representing that the moment they heard from their clients they would write again. They, however, purposely delayed writing, and in the interim filed their bill. [The Lord Chief Baron.—I assume that they filed their bill in consequence of your notice that you had instructions to file yours; but is it not reasonable for an executor, if he finds himself sued by a creditor or legatee either at law or in equity, to file a bill to bring the whole matter before the Court?] If the plaintiff cannot sustain this suit, she is, at all events, entitled to her costs up to the time when she had notice of the decree: *Jackson v. Leaf* (b); and also, under the circumstances, to the costs of this application.

Mr. Barber, in reply.

(a) 2 Mer. 480.

(b) 1 J. & W. 229.

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THE LORD CHIEF BARON.—If the defendants are willing to pay a moiety of the arrears, I shall dispose of the bill at once. If they are not willing to do that, I shall only stay the proceedings. [It was here stated that the defendants would pay the arrears.] The probate of this will was only established in June last, until which time the executors could do nothing. The plaintiff certainly filed her bill with sufficient despatch. She could have no reasonable doubt as to the conduct of the executors, and therefore it was rather a harsh measure to commence this proceeding. Neither am I prepared to condemn the executors for filing their bill in Chancery. My opinion is, that, upon payment of a moiety of the arrears of the annuity, the bill must be dismissed. I think the plaintiff is entitled to the costs of the suit, but not to the costs of this application.

Order accordingly.

Feb. 2nd, 3rd,
June 20th.

LOVELL v. HICKS and Others.

Agreement for the purchase of part of the profits of a patent, which turned out to be a mere bubble, set aside as having been obtained by fraud and misrepresentation, and so much of the purchase money as had been paid under the agreement ordered to be repaid.

Smells, that joint-owners of a patent are answerable for losses occasioned

THE defendants being joint owners of a patent for "An economical apparatus or machine to be applied to the process of baking for the purpose of saving materials," entered into an agreement with the plaintiff for the sale to him of a licence to use the patent within a limited range in the neighbourhood of Birmingham. The plaintiff, who had paid \$000*l.* under this agreement, now brought his bill to have it set aside for fraud, alleging that the defendant Hicks had represented to him, that, by means of this apparatus, bread might be baked in the ordinary manner so as to save the spirit, and realize a large profit; that to give colour to these representations Hicks had made various experiments be-

by their co-adventurers, only to the extent of their respective shares.

fore the plaintiff and others, which appeared to produce that result; that on the faith of these representations and experiments the plaintiff had entered into the agreement in question, but that he had since found that the apparatus effected no saving in bread baked in the ordinary manner, and that, in the experiments which had been made, Hicks had fraudulently, and unknown to the plaintiff, introduced a particular sort of ferment, and likewise spirits, by which means he had apparently succeeded in the undertaking, but had in fact grossly deceived the plaintiff. The bill charged the other defendants with being participators in the fraud.

The evidence in support of the plaintiff's case is fully detailed and commented upon in the judgment.

Mr. *Knight*, Mr. *Ching*, and Mr. *Blunt*, for the plaintiff; in the course of a long argument, which was chiefly addressed to the facts of the case, referred to *Small v. Attwood* (a), and the cases there cited; and contended, on the authority of *Colt v. Wollaston* (b), and *Blain v. Agar* (c), that it was not necessary to shew that Hicks had been guilty of direct misrepresentation; for that, if it could be proved that he had merely gulled the plaintiff, it was sufficient to enable the Court to set aside the agreement. They also contended that the other defendants were answerable for the fraud of Hicks, as their agent or co-partner.

Mr. *Wigram* and Mr. *Heathfield*, for the defendant Hicks, and another defendant.—It cannot, perhaps, be said, that a bill to recover money merely on the ground that the party paying the money was deluded, will not lie in a Court of equity. But, with the exception of *Blain v. Agar*, there has been no case since that of *Colt v. Wollaston* in which the general proposition has been laid down,

(a) 1 Younge, 416, 460.

(b) 2 P. W. 154.

(c) 2 Sim. 289.

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that, because a fraud has been practised, therefore a party can come into equity bringing, as it were, an action of deceit. Suppose a horse-dealer uses an art to conceal a defect—will a bill lie? To bring a case of this kind into a Court of equity, the circumstances of concealment must be such as will afford ground for equitable relief. For instance, when an estate has been conveyed away under circumstances of fraud, you cannot recover it at law, but must come into equity. *Small v. Attwood* was a very complicated case, and is no authority on this occasion. Attwood had sold an estate to the iron company, on the representation that he was making iron at a certain cost. He had suppressed certain stock-papers which would have shewn the truth. Beyond that, he had put the company into possession; and a long time elapsed, namely, from November to June, during which they were working as Attwood's agents. That, therefore, was a case of account, and of complicated circumstances, and on that ground distinguishable from the present. As to *Blain v. Agar*, it is a case which cannot be supported upon any principle, unless upon this—that it was a suit calculated to dispose of one general right applicable to many cases, and to prevent a multiplicity of suits. That explanation may give it some authority, but otherwise it goes the length of establishing that any one may come into a Court of equity for damages. Admitting, however, the authority of that case, it is optional with the Court either to grant relief, or leave the parties to their action.

The present case cannot be supported as one of misrepresentation. In the several cases on that subject the fraud complained of was, not that the party had given a warranty, but that he had stated or suppressed some fact which would operate on the mind of the purchaser: *Lisney v. Selby* (a), *Dobell v. Stevens* (b), *Edwards v. M^r Leay* (c).

(a) 2 Lord Raym. 1118.

(b) 3 B. & C. 623; 5 D. & R. 490.

(c) Coop. 308.

In all those cases the difference between the fact and the representation was the measure of the damages. What takes place afterwards is nothing. In *Dobell v. Stevens*, suppose the trade had fallen off after the sale, the vendor would not have been answerable for that; nor is the defendant in this case answerable for the failure of the project. Besides, the plaintiff is bound by the written contract. In *Pickering v. Dowson* (a), the Judges held, that where a contract for the sale of chattels is reduced into writing, whatever parol representations may be made, the writing alone binds the parties. The observations of Sir Thomas Plomer in *Clowes v. Higginson* (b), tend the same way. [Alderson, B.—There is a clause in Lord Tenterden's Act (c) upon which some difference of opinion has been entertained by the Judges, and which seems to be founded on the same view of the subject.]

Lastly, even supposing that Hicks made a representation with a fraudulent intent, if the other party upon finding out the fraud did not take immediate steps to have his contract rescinded, his remedy is at an end: *Campbell v. Fleming* (d), *Dyer v. Hargrave* (e). Here, there is evidence to shew that the plaintiff stood by to see how the patent would work, and finding that it did not answer his expectations, filed this bill. He did not act solely on the representations of Hicks, but made various inquiries on the subject after he had seen the experiments. It is immaterial, therefore, what were the views of Hicks if the plaintiff obtained such information *aliunde* as induced him to join in the undertaking. The case of *Lisney v. Selby* is applicable to that point. In any view of the case, Hicks is not the agent for the other defendants, so as to make them answerable for his acts beyond the amount of

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(a) 4 Taunt. 779, 786.

101; 1 Tyr. & G. 250.

(b) 1 Ves. & B. 528.

(d) 1 Adol. & Ell. 40.

(c) 9 Geo. 4, c. 14, s. 6. See

(e) 10 Ves. 505.

Lyde v. Barnard, 1 Mees. & Wels.

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their respective shares. In that respect they stand in a situation similar to that of part-owners of ships, who are not answerable for the acts of each other except in regard to repairs.

Mr. *Lynch*, for a defendant of the name of *Smith*, contended, that, as his client had received none of the monies, and had entered into an agreement of which the plaintiff had notice, not to be answerable for any loss, no decree could be had against him.

Mr. *Knight*, in reply.

In the course of the argument *Alderson*, B., observed, that it was incumbent on the plaintiff to shew active fraud in the defendant with a view to misrepresent; and for that purpose to shew that the baking experiments made by him were false experiments, and effected by means of an extraordinary ferment.

June 20th.

ALDERSON, B.—This was a bill filed by the plaintiff, Edward Bourne Lovell, against the defendants, Robert Hicks, Octavius Henry Smith, Ralph Watson, and William Todd, praying that the agreement made the 3rd of March, 1832, may be set aside on the ground of misrepresentation and fraud, and may be delivered up to be cancelled; and that the defendants may be directed to repay to the plaintiffs the sum of 3000*l.* received by them, with interest, and may be restrained by injunction from bringing any action to recover the remainder of the money, 2000*l.*, due under the agreement. The question has been very fully and satisfactorily discussed by the learned counsel on both sides, who have most ably assisted the Court in coming to a conclusion, by laying successively before it all that could properly be urged on behalf of their respective clients; and the Court is much indebted to them for that assistance.

The question resolves itself into this—whether the plaintiff can make out in fact such a misrepresentation and such fraud as entitles him, after the acquiescence, for some time at least on his part, to come to a Court of equity to rescind his contract—and, if so, then against whom, and to what extent is he entitled to relief? I do not think that there is any very material difficulty in the principles by which my decision must be governed. They are laid down by Lord *Lyndhurst* in his very able judgment in the case of *Small v. Atwood*; and I believe are such as cannot be doubted or impugned. Although that decision is now undergoing review in the House of Lords, I do not conceive that this part of it is or can be shaken. If the contract be founded on fraudulent misrepresentations, such as would in a Court of law be sufficient to support an action on the case, it may in a Court of equity be rescinded. Now, the fraud may consist in the misrepresentation of a fact material to the contract, where the truth of that is known to the one party and unknown to the other, and the misrepresentation is intentionally made with a view of procuring a more advantageous contract than the real facts, if truly stated, would have warranted. This is the nature of the case on which the plaintiff relies; and I do not doubt that if this be made out to my satisfaction, the plaintiff ought to be relieved, unless indeed he has, after full knowledge of the truth, persisted in the contract previously made.

Starting, therefore, from these principles, I proceed to examine the facts in this case which appear in evidence; and, although I am not insensible of the disadvantage which a Court of equity labours under in not having the benefit of oral examination, which I own I have long thought might with great advantage be given to it, to be exercised by it at its discretion, and applied to such parts of a case only as might be found after discussion to require it; yet, when I compare the counter-balancing advantage

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of long and calm deliberation, and of dispassionate inquiry which a Judge possesses, who can at leisure weigh all the circumstances, with the sudden and hasty decision of a jury at *Nisi Prius*, even though assisted by oral examination, I have no doubt that, upon the whole, in nice and complicated questions such as this, I should not do real justice to the parties by directing an issue.

It appears, that, on the 9th June, 1830, a patent was taken out; and that, on the 29th December, 1830, a specification was filed of the nature and mode of carrying into effect the invention for which the patent had been previously obtained.

The claim in the patent was of an invention of an economical apparatus or machine to be applied to the process of baking, for the purpose of saving materials; and in the specification it is stated, that "such apparatus bakes the bread, and collects a certain spirituous vapour, which is always disengaged from fermented dough during the process of baking the same into bread, and which vapour is usually dissipated and lost; but by the refrigeratory or condensing part of the economical apparatus or machine, the said vapour is condensed into liquid materials, containing spirit or alcohol, and from which materials useful spirituous liquors may be drawn by the processes usually practised for the rectification of raw spirits." In another part of the specification it is distinctly stated, that the flour having been previously converted into dough and duly fermented, and then made up into loaves according to the usual method, the loaves are introduced into the oven, &c. And again, at a subsequent part of the specification, the following statement occurs:—"The liquid materials thus saved by my economical apparatus or machine during the process of baking fermented dough into bread, is a diluted spirit, from which a useful spirit may afterwards be extracted by the usual process of rectification. The alcohol, which constitutes the value of the materials saved by my

economical apparatus or machine, is produced in the process of fermentation which the flour or dough has undergone in the manner usually practised for preparing dough for bread. That alcohol has been hitherto dissipated in vapour, and totally lost; but my aforesaid economical apparatus or machine being applied in the process of baking such dough into bread, the said alcohol is saved and collected; and although it is intermixed with water and other liquid matters which are evaporated from the dough at the same time, the liquids so saved are useful materials for the rectifiers of spirits to extract fine spirit from." I have referred more particularly to these parts of the specification, in order to shew the grounds on which I have clearly arrived at the conclusion, that this invention purported to be one for obtaining spirit by means of a patent apparatus for baking bread of the ordinary description, fermented in the ordinary method. I can feel no doubt on this subject.

In March, 1832, after a negotiation, to which I shall advert, the agreement in question was executed, under which 3000*l.* has subsequently been paid. By that agreement Robert Hicks, the original patentee, together with Mr. Smith, Mr. Watson, and Mr. Todd, who had intermediately obtained an interest with Hicks under an assignment of it, granted their licence to the present plaintiff, Mr. Lovell, to exercise the patent within the town of Birmingham, and a limited circle round it, in consideration of 1000*l.* then paid, and of the further sum of 4000*l.*, to be paid by certain instalments. Now, the plaintiff says, he was induced to make this agreement by certain fraudulent misrepresentations made by Robert Hicks.

In June, 1831, it appears that a letter was inserted in the Staffordshire Advertiser, signed by a miller of the name of Pratt, in which a very favourable account was given of the new invention. This letter, it is said, was corrected as to some of its details by Mr. Hicks, and in

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particular it is stated, that the representation that three bushels of flour would produce eighteen pints of liquor, containing 20 per cent. of alcohol, was expressly made by Hicks, he having altered Pratt's original draft of the letter from 18 per cent. to 20 per cent. in his own handwriting. This fact depends on the testimony of several witnesses. [His Lordship here commented on their testimony.] On the other hand, there is the distinct denial of these circumstances by Hicks in his answer; and very powerful observations have been made on the probabilities of the case, and on the credibility, as to this part of it, of the plaintiff's witnesses. And it is contended with great force, that it is quite obvious that the expression "alcohol" in the statement, if made, was clearly in the course of the negotiation understood by all parties to mean proof spirit, and not alcohol in the strict chemical use of this word, and to this latter part of the defendant's argument I fully accede; but the weight of evidence appears to me to be in favour of the plaintiff as to the representation.

The next fact adduced by the plaintiff relates to a meeting at the Stork Inn, in Birmingham, at which he was present. There, a sort of experimental baking took place, and similar representations were made by Hicks, which seem fairly enough proved. Then come two meetings at Bilston, between the plaintiff and Hicks, at both of which similar representations were made, and Pratt's letter was read by the plaintiff. Then follows the journey to Chelsea, at which the apparatus belonging to the defendants was shewn to the plaintiff, and he had an opportunity of examining the results, and a portion of the spirits thereby produced was delivered over for him to inspect and examine.

All these circumstances which I have thus cursorily gone through took place before the agreement in question; and it is not unfair to conclude that these were in truth the circumstances which induced the plaintiff to enter into

that agreement. What, then, are these circumstances? They appear to me to amount to this:—here is a clear statement by Hicks that he was in possession of an apparatus for baking ordinary bread, whereby the spirit therefrom produced would be saved. Here is a statement also that the spirit so produced amounts to a quantity, either of 18 pints, at 20 per cent. alcohol, produced by three bushels of flour; or, if I state the defendant's case most favourably, at all events to a highly advantageous amount. And there is also a performance of experiments in the plaintiff's presence, first at Birmingham, and afterwards at Chelsea, and in town, by which he is induced to believe that such representations are in substance true.

Then, if so, are the other facts such as to satisfy me that this was not a true statement, and that Hicks knew all the time that it was false? That is the conclusion at which, after much consideration, I have been obliged to arrive. In the first place, I think that it is proved on the part of the plaintiff that the bread baked was not substantially bread of the ordinary description. There may be, no doubt, though that is not very satisfactorily made out, great differences of practice in preparing bread, as to the ferment used; but there is no balance of testimony as to the point that the particular ferment used by Hicks varies from all those hitherto in use most materially, and precisely in those respects which would produce a favourable result in those experiments which might be made to shew off the new process. Nor do I think that any doubt can reasonably be entertained on the evidence before me, that ordinary bread, baked according to the patent process, will produce no advantageous results to the parties.

If these facts were known to Mr. Hicks, every experiment becomes of itself a fraudulent misrepresentation. Now, the circumstances satisfy me that Mr. Hicks must have known this. I cannot well account, except on this supposition, for the peculiar care and watchfulness over the

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ferment which was secretly prepared by him when used, and for the peculiar secrecy which, according to the plaintiff's evidence, was observed at the time of the experiments made in the presence of the committee at Bilston. Indeed, when I observe the great secrecy as to the ferment, compared with the ostentatious openness as to the other parts of the process, I think it shews plainly enough that Mr. Hicks must have been conscious that in this respect he was practising a deception on the plaintiff and the other persons. All the testimony, with the exception of that of one witness, seems to me uniform as to this; and I am by no means satisfied with the testimony of that witness.

I do not think it necessary to refer to the circumstances of the addition of the spirits to the liquor produced from one experimental baking. There is some contradictory evidence as to the fact. If it were entirely true, this would be an act of very gross fraud on the part of Mr. Hicks. The witness for the defendants who speaks to this point does not deny very improper conduct, but only exculpates Hicks from having personally participated in it. The whole transaction is suspicious.

The other parts of the case, however, are clear. If, indeed, the question had depended merely on the misrepresentation as to the extent of the profits, and it had appeared that the results obtained, varying as they do as to the amount of spirit produced, were all that the plaintiff relied on to prove fraud, I should not have thought that a strong case had been made out. If the bread actually baked had really been ordinary bread, or if the attention of the purchaser had been called to the fact of its not being prepared in the ordinary way, either before or during the early experiments, even after the agreement of the 3rd March, 1832, I should have been disposed to think, either that no fraud had been practised, or that, at all events, even if there had been fraud, he had persisted much too long after full knowledge of the facts to be entitled to re-

lief. But it seems to me, that from the beginning he is misled by the patent and specification, and that the defendant Hicks must have been fully aware of the delusion under which this bargain was made.

I do not rely on the mere failure to produce the quantity of spirit originally stated by the projectors. I do not think that the plaintiff acted on such representations taken literally. The experiments made, with which he expressed his satisfaction, shew this, I think, to have been the case. But I think that, throughout, he and those with whom he acted thought, and had reason to think from the representations made, that they were purchasing an apparatus for baking ordinary bread; that they were to compete with ordinary bakers on vantage ground, and that the quantity of spirit to be produced (which I allow must be taken to be proof spirit) was to be their means of profit. This, I think, was the state of facts under which the bargain was made; and if the main fact was known to Hicks not to be true, what were all the statements he made, and the fallacious experiments which he himself knowingly exhibited, and knowingly permitted the other party to make and to see, but so many laborious frauds practised on his part upon the plaintiff? I am satisfied, therefore, that fraud has been made out so far as Hicks is concerned; and I do not think that, after full knowledge of it, the plaintiff has ever acquiesced in the bargain. I am not at all satisfied that he ever knew the ingredients of the ferment till the receipt was delivered to him on the 5th December, 1832. It is clear that he was not a baker; and the period when he first knew the extent of the misrepresentation would be, not the time when the receipt was first given to him, but that when he first knew, or reasonably might have known, that the ferment was substantially different from those in common use. That time does not appear; and this suit was commenced in February, 1833. I think, therefore, that the plaintiff is, on the whole, entitled to relief.

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But then, the other defendants are not affected directly or indirectly with that fraud, and only have received their proportional shares of the money through Hicks. As to one of them, Mr. Smith, it is further proved that he had no interest, except as a nominal party to the agreement; that he had received no part of the plaintiff's money, and that the plaintiff had full knowledge of these facts when the money was paid.

The relief, therefore, to which the plaintiff is entitled, appears to me to be this: That the agreement be cancelled, and that the defendants be enjoined from pursuing any action on it against the plaintiff; that the Master should inquire how much of the 3000*l.* has been respectively received by Hicks, Watson, and Todd, and that each of these parties should be decreed to repay what has been received by him, with interest at 4*l.* per cent; that, as against Mr. Smith, the bill be dismissed with costs; that the plaintiff should have his costs against the other three defendants, and also be repaid by them the costs he pays to Mr. Smith.

Decree accordingly.

Feb. 16*th*.
24*th*.

In cases of mistake, the time of limitation, which by analogy to that prescribed by the 21 Jac. 1, c. 16, is held to bar the remedy in Courts of equity, begins to run from the time of the discovery of the mistake.

BROOKSBANK and Another v. SMITH.

²³⁻⁴⁶⁷
ELIZABETH BRAME, widow, being entitled to a sum of 1000*l.*, 3*l.* per cent. Consols, in reversion, expectant upon the decease of Eliza Stevens, by her will, dated in January, 1815, bequeathed the same to her six children, by name, their executors, administrators and assigns, to be divided between and amongst them, share and share alike: provided that if any of her said children should die in her lifetime, leaving issue or children, the share of any child so dying should not lapse, but go and be paid to such issue.

Elizabeth, one of the children of the testatrix, married the defendant, John Smith, and died in May, 1818, in the

lifetime of the testatrix, leaving her husband and three children surviving her. The testatrix died in July, 1818, and Eliza Stevens, the tenant for life, in June, 1827. Upon the death of Eliza Stevens the trustees of the stock transferred the same to the several parties who appeared to be interested under the will, and amongst others to the defendant, whose wife, they were informed, had survived the testatrix. In December, 1833, the trustees had notice for the first time that the children of Elizabeth Smith claimed a one-sixth share of the 1000*l.* stock bequeathed by Elizabeth Brame, and upon a further investigation of the circumstances it appeared that their claim was well founded.

In consequence of this discovery, the trustees, in June, 1834, filed the present bill to compel the defendant to refund the share which had been paid to him under a misapprehension of his interest. Part of this had been disposed of by the defendant, who was in poor circumstances, but there remained a sum of 100*l.* stock, which the plaintiffs identified as the residue of the share so transferred. The defendant, by his answer, relied on the Statute of Limitations.

Mr. Barber, and Mr. Heathfield, for the plaintiffs, contended, that the objection arising from the Statute of Limitations could not avail the defendant; that in cases of fraud the statute did not operate as a bar in a Court of equity until after the expiration of six years from the discovery of the fraud; and that the same rule must apply in cases of mistake. They cited *South Sea Company v. Wymondsell* (a), *Hovenden v. Lord Annesley* (b), and *Whalley v. Whalley* (c).

Mr. Chandless, and Mr. James Russell, for the defendant, observed, that no authority could be cited to shew

(a) 3 P. W. 143.

(b) 2 S. & L. 634.

(c) 3 Bligh, 12.

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that any analogy existed between cases of fraud and mistake in matters of this nature.

Mr. Barber, in reply.

Feb. 24th.

ALDERSON, B.—On looking at the cases I think that the plaintiffs are entitled to a decree. Here, there is stock transferred by them as trustees, and by mistake. On the whole, I am satisfied that it was a mistake of fact, and the bill is to re-transfer the remainder of that original stock so transferred, the fund being clearly identified, and consequently the party having a special lien upon it.

Then, is the Statute of Limitations a bar to the remedy sought by this bill? It seems to me that it is not so. The statute does not absolutely bind Courts of equity, but they adopt it as a rule to assist their discretion. In cases of fraud, however, they hold that the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances. In this, Courts of equity differ from Courts of law, which are absolutely bound by the words of the statute. Mistake is, I think, within the same rule as fraud. Here, therefore, the statute was not applicable, for the mistake was first discovered within six years before the filing of the bill. I think, therefore, that the decree should be for the plaintiffs, but without costs; and as they have offered to take the 100*l.*, which is the whole of the stock that remains, I think they should be bound by that offer.

Decree accordingly.

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PERROTT v. BRYANT and Others.

April 21st.

May 5th.

BILL by the impropriate rector of the parish of Oystermouth, in the county of Glamorgan, against certain of the inhabitants of that parish, being owners and occupiers of boats moored within that parish, and employed in the oyster fishery, for the customary tithe of oysters within that parish.

The bill alleged that the parish of Oystermouth adjoins and extends into the sea, and has been time out of mind a fishing place, and that there has been in the said parish an immemorial custom, that every inhabitant of the said parish, and others, being proprietors or occupiers of any oyster-boat or boats, or any boat or boats used or employed in the taking or carrying of oysters, which have been usually tied, moored, or kept within any part of the said parish, when not used, have immemorially paid, and by custom ought to pay, to the owners of the said rectory for the time being, the tithes of all oysters brought in from the sea in such boat or boats, and removed therefrom and laid on the perches within the said parish; and also of all oysters brought in such boat or boats into the sea within the said parish, and removed from such boat or boats into ships or other vessels without being landed or laid upon the said perches.

The defendants, by their answers, denied the custom of tithing oysters, as laid in the bill, or that there had been any immemorial custom in the parish of Oystermouth relating to the tithes of oysters, or to any payment in lieu thereof. They admitted, however, that payments had been made in respect of such tithes, but insisted that, as that had been done solely through intimidation, they were not bound by any evidence of such payments. They admitted that the parish of Oystermouth adjoined the sea, but stated

Where a bill was brought for the customary tithes of oysters, alleging the customary payment to be in the owners and occupiers of boats employed in the fishery, and usually moored within the parish:—*Held*, that it was not necessary to make the dredgers for the oysters, who had no interest in the boats, but who shared in the profits of the oysters, parties to the bill.

Oyster dredgers agreeing to receive from the owners of the boats, who were their employers, a stipulated share of the profits arising from the sale of the oysters, held not to be co-adventurers with the owners.

The circumstance that property situate on the sea-shore, between a sea-side town and the sea, has not been assessed to the poor's rates of the parish in which the town is situate, is very slender evidence of the property not being within the parish.

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that they did not know or believe that it extended into the sea. They denied that they moored their boats within the parish, inasmuch as they moored them beyond low-water mark.

The defendants then alleged, that, for many years past their boats had been employed in dredging for oysters in the open sea of the British Channel for many miles distant from the parish of Oystermouth; that the oysters so taken had from time immemorial generally been brought to and discharged upon perches, which were small slips of ground marked out on the sea-shore considerably below high-water mark, but somewhat above the mark of low-water at spring tides, but below low-water mark at neap tides, for which perches small sums were paid by way of acknowledgment to the lord of the manor, by the boat-owner. They further stated their belief, that the perches were not within the parish of Oystermouth; and they added, that the oysters were sometimes not landed at all on the perches, but transported from the boats to the ships, at sea, and far beyond low-water mark.

The defendants then stated the mode of payment for the oysters, and division of the profits, as follows:—that the captains of the vessels purchased the oysters from the boat-owners, generally giving 11s. per thousand for the best, and 9s. 6d. per thousand for the inferior oysters; and that the gross amount produced by such sale was divided between the owners of the boats and the crew or dredgers, in manner following; that is to say, for the best oysters the boat-owners got 2s. 6d. per thousand, and the dredgers or crew of the boat (who were generally four in number) 8s. 6d. per thousand; and that for the inferior oysters, the boat-owners got 3s. per thousand, and the dredgers or crew 6s. 6d. per thousand. That in general the dredgers or crew were not paid by the boat-owners until the oysters were reckoned and delivered on board the vessels purchasing the same; and should the whole stock

of oysters deposited on the perches (which at times consisted of many weeks' taking) be killed by frost, which often happened, or by any other accident, the dredgers always bore their proportion of the loss, having no claim on the owners of the boats. The defendants submitted, that, under these circumstances, the dredgers or crew were necessary parties to this suit.

The cause now coming on for hearing, the depositions of many witnesses were read for the plaintiff, proving the custom within the parish of Oystermouth of payment by the owners of the dredging boats of every tenth hundred of the oysters brought in and laid on the perches as tithe, and that this tithe was formerly taken in kind, and afterwards by composition. Depositions were also read as to the custom of paying tithe of the oysters shipped at sea, and as to a composition which had been entered into in respect of this tithe. The plaintiff likewise gave evidence by reputation, that the parish of Oystermouth extended into the sea; and proved that the perches were situate on the shore, between high and low-water mark, adjoining the town of Oystermouth.

Evidence was read for the defendants, with a view to shew that the payments which had been made for tithe had only been obtained by extortion. The witnesses on that side also deposed to their belief that the perches were not within the parish of Oystermouth, never having been assessed to the poor-rate; and that it never was understood or reputed that that parish extended into the sea, or at all events beyond high-water mark.

Mr. Boteler having opened the case for the plaintiff,

Mr. Stuart, for the defendants, took the objection (already raised by the answer) for want of parties, contending that the dredgers or crew of the boats ought to have been made defendants; that the sale of the oysters was

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made by the owner or occupier of each boat for the benefit of all the parties concerned—namely, himself and the dredgers; that the adventure was a joint adventure for all, for the profit of all, and at the risk of all. He cited *Coppard v. Page (a)*.

Mr. Boteler, Mr. Simpinson, and Mr. W. Eagle, for the plaintiff.—The defendants rest their objection for want of parties on general rules of pleading, entirely overlooking the nature of the custom laid, which is, that when the oysters are laid on the perches, the tithes accrue, and that the owners of the boats are the parties to set out those tithes. The owners can no more complain of that, than of the oysters being washed off the perches. *Coppard v. Page* was not argued upon this ground. There, it does not appear that any special custom with reference to the person who was to pay, was alleged by the bill; and, therefore, the general rule that all parties interested in resisting the demand must be made parties, would apply. All the parties interested were those who were bound to pay; and the case was the same as where lands are occupied by joint-tenants, and a bill is brought for tithes against one only. Here, it is not alleged that the tithes are paid by the dredgers, but by the owners and occupiers of the boats, a class of persons distinctly recognised and defined by the defendants as well as the plaintiffs, and understood to be the persons who have the absolute ownership, or who at least are the lessees of the boat. There are several cases in which customs of this nature have been similarly stated: *Gwavas v. Teage (b)*. [*Alderson, B.*—It does not appear that the objection was taken in that case. No crew was interested in the matter. In general, the crew are paid by a proportion of the fish, as in the whale fishery.] *Gwavas v. Kelynack (c)*, and *Wells v.*

(a) Forrester, 1; 2 E. & Y. 494. (b) 1 Wood, 203; 1 E. & Y. 528.

(c) 2 Wood, 285; 2 E. & Y. 1.

Harris (a), are authorities for the plaintiff. Even laying out of the question the mode of stating the custom, it would be highly inconvenient to require the dredgers to be made parties, who are changing from week to week and from day to day. In the *Hastings* case the question was argued, not upon any specialty in the custom, but upon the inconvenience of making so many parties.

The other objection raised by the defendants is, that the parish of Oystermouth does not extend into the sea; and, consequently, that their boats are not moored, and the perches are not situate, within the parish. It is indisputable, however, that the boundary of a parish on the sea-shore is, not high, but low-water mark, and that the Admiralty have no jurisdiction over the shore at low-water mark. If a body is found on the shore between high and low-water mark, the Admiralty coroner does not sit. The accident that the perches have not been rated to the relief of the poor, cannot affect the general rule of law on this point. [*Alderson, B.*—The fact of the perches having paid tithes, is strong evidence of their being within the parish; far stronger than their having been assessed to the rates would have been.] Lastly, the defendant's denial of the custom will not make it imperative on the Court to direct an issue: *Gwavas v. Teage (b)*, *Beresford v. Newton (c)*.

Mr. *Stuart*, Mr. *G. Richards*, and Mr. *W. M. James*, for the defendants.—Nothing has been said on the other side to invalidate the case of *Coppard v. Page*. It is said, indeed, that here, the custom affects particular parties only—namely, the owners; but that is not admitted by the answer, which states the owners and the dredgers to be co-adventurers, and jointly interested in profit and loss.

(a) 3 Wood, 385.

(b) 1 Wood, 203.

(c) 1 Crompt. Mees. & Rosc. 901.

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There may be a custom for particular parties to pay, and those parties may employ the dredgers, but it does not follow from this that the latter are not affected by the custom. [Alderson, B.—You must shew affirmatively that the dredgers are within the custom, and interested in this matter.] If there be a right of contribution, the proper parties must be before the Court. It is not competent for the Court to dispose of such a case as this without bringing before it those who have a right to an account. [Alderson, B.—I doubt whether in the most favourable view for the defendants, that which is stated to be an interest in the dredgers, is more than a mode of receiving their wages.] Next, there is no allegation of a good and valid custom; or, if there be, no proof has been given that the payments which have been made, were made in conformity with the custom. Besides, the plaintiff ought to prove a custom undisputed and uncontested. On the contrary, the defendant's evidence is strong to shew, that the payments have been obtained by extortion. Moreover, bills alleging all sorts of customs have been filed. Here, the tithes are alleged to be payable by the proprietor or occupier; a loose mode of expression, which, if applied to a modus, would never have been admitted. An owner and lessee of a boat are as distinct as a proprietor and farmer of land. Besides, it is doubtful from the evidence who is to pay. Upon the question of boundary, it is well known, that the land between high and low-water mark belongs to the Crown: *Hale de Jur. Mar.* 26. It is for the plaintiff to prove that the Crown has been deprived of its original right. There is no evidence of that fact. Besides, how does it follow that the place is not extra-parochial? The plaintiff has not shewn that any assessment has been made, or any rate paid in respect of the perches, and the contrary is shewn by the defendants. [Alderson, B.—All the parties who paid tithes for the oysters on the perches, did so on the supposition that the

perches were within the parish. If they were extra-parochial, the tithes would be in the Crown.] The custom, at all events, is so uncertain, that the Court will allow the parties to try their right by action: *Foxcraft v. Parris* (a). The legal right ought properly to be established at law: *Northleigh v. Luscombe* (b); *Mayor of Reading v. Winkworth* (c).

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Mr. Boteler, in reply.—The dredgers are merely paid by their employers in a particular manner, and that does not make them liable for these tithes. The party liable to pay is the party who has the boat in his possession during the season, either as absolute owner, or in any other character. Of the parochiality of the spot in question there is no doubt. It is not less within the parish because it may belong to the Crown, or a private person's royalty may extend there.

ALDERSON, B.—There are two questions in this case—one, whether the present defendants are the proper parties to this suit, or whether others also ought to have been joined. The second—whether, supposing that to be so, the plaintiff has sufficiently established his right to the tithe claimed by him—that of oysters.

May 5th.

It is undoubtedly clear that the plaintiff must make all the individuals who have an interest in the subject-matter of the suit, parties to it, in order that the decree may put an end finally to the litigation between them, by concluding all those whose interests are thereby affected. The question, however, is, whether this has not been done? The present defendants are admitted to be the owners of the boats, the produce of whose

(a) 5 Ves. 221; 2 E. & Y. 487.

(b) Ambl. 12.

(c) 5 Price, 473.

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fishing is sought to be tithed: but they say, that all the crews of the respective boats are also jointly interested in the fish taken, and ought to have been added as parties to the record. Before I accede to an objection which would produce so inconvenient a result to both parties, I ought to be clearly satisfied as to the fact. In the case cited to me of *Coppard v. Page (a)*, this was clearly made out. There, the adventurers in each fishing boat shared jointly as partners the profits and losses of the adventure, according to agreed proportions. But here, the fact is very indistinctly stated in the defendants' answers, and is not more distinctly made out by the evidence. I should conclude, from the facts appearing on the evidence, that this is really only a mode of calculating the amount of wages due to the dredgers from the owners of the boats, and that the former take no interest in the fish themselves, which wholly belong to the owners of the boats. If this be so, then there is no necessity for making them parties to the record. Besides, this is a tithe claimed by custom; and the special custom, if established, (and unless that be so, the plaintiff has no claim), lays the burthen of the tithe on the owners or occupiers of the boats alone. Upon the whole, I think this objection fails.

Then, is the custom proved?—for, unless it be so, there is an end to the plaintiff's case. The evidence is all one way; and, although there is undoubtedly a larger proportion of witnesses who prove the taking of tithe of oysters from the perches, yet there is quite a sufficient body of testimony to satisfy me as to the other branch of the custom also—that of taking the tithes of oysters brought within the parish by boats, and sold.

Then, are these perches within the parish? and are the boats moored there? This is, in truth, but one question; for, as the boats are moored nearer to the shore

(a) Forreast, 1.

than the perches, it would follow, that, if the perches were within the ambit of the parish, the mooring places must, in all probability, be so too. Now, according to the plaintiff's witnesses, who state the boundaries of the parish, both are included therein; and the defendant's witnesses do not, in fact, negative that statement, for they only say, argumentatively, that they do not think they are within the parish, inasmuch as, although profitable property, they have never been rated to the poor. But, this is not at all a strong circumstance; for the omission to rate property may have arisen from various causes, as well as from the property not being parochial. On the other hand, under a custom to tithe oysters brought into the parish, the tithes of oysters placed on these perches have, for upwards of sixty years at the least, been taken without dispute. Lord *Hale* says, that the land between the ordinary flux and reflux of the sea may be parcel of a vill or parish, and that the ordinary means of proving it are by perambulations, common reputation, known metes and divisions, and the like. Here, the whole ground in dispute is within the limits of the ordinary tides.

Upon the whole; then, the evidence satisfies me that these perches and mooring places are within the parish, and that the custom to take tithes of oysters is proved as laid in the bill; and, as there is no valid objection as to the want of proper parties, there must be a decree as prayed, with costs.

Decree accordingly.

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April 13th.

Lord CRANSTOWN v. GOLDSHEDE and Another.

A defendant in contempt for want of an answer, cannot move to have the bill dismissed, even upon the terms of giving the plaintiff all the advantage of a decree: his proper course is, to move to set aside the attachment.

THE bill was filed to restrain the defendants from bringing trover for a promissory note originally given to them by the plaintiff, but now in his possession, and likewise to restrain any other action or actions which the defendants might bring against them in respect of the note. An attachment, for want of an answer, had issued against the defendant Goldshede. The other defendant had put in a disclaimer.

Mr. Bacon, for the defendant Goldshede, now moved, that, upon payment of costs, the bill might be dismissed, and that the attachment and all further proceedings thereon might be stayed; he having discontinued the action and paid the costs of it.

Mr. Hayter, contra.—The defendant cannot make this motion till he has cleared his contempt by putting in an answer. An answer may be useful to the plaintiff, because, though the defendant may have discontinued this action, he may bring another. Besides, although the other defendant has disclaimed, exceptions may be taken to that disclaimer, and he may be made to answer. In cases of this nature, the Court will go no farther than preventing a decree from being taken against the defendant; they will not order the bill to be dismissed. This is not a motion relative to the contempt itself, and therefore cannot be entertained, so long as the contempt remains.

Mr. Bacon, in reply.—The object of the motion is to shew that the defendant ought not to be compelled to answer; in effect, therefore, his motion does relate to the contempt. He has discontinued his action, and offers all that the plaintiff could ask, or the Court could give him by means of a decree. He has, therefore, a right at once to

put an end to this suit: *Boyes v. Ford* (a); *Praed v. Hull* (b),
Wilnot v. Maccabe (c), *Bishop of Derry v. Tyler* (d).

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The LORD CHIEF BARON.—In general, it would be most unreasonable and unjust, if the Court, upon mere technical grounds, could not put an end to a suit at the instance of the parties. But there is a great difficulty in so doing, where the party who makes the application is in contempt. In cases of contempt, the Court proceeds on one general rule. It might in the present case be expedient to deviate from the general rule; but on the other hand, that deviation might lead to greater difficulties. The motion cannot be entertained in its present shape. The party should have moved to set aside the attachment upon taking a decree against him, and payment of costs. Any party may come to set aside an attachment on terms; therefore, unless some terms can be agreed upon, the motion must be dismissed.

Order by consent; the parties entering into terms.

(a) 4 Madd. 40.

(b) 1 S. & S. 331.

(c) 4 Sim. 263.

(d) In Ch. July, 1834. The bill in this case prayed that the defendant might be decreed to deliver up a certain bond to the plaintiff to be cancelled, and that satisfaction might be decreed to be entered up on the record of the judgment.

An attachment and commission of rebellion having issued against the defendant, for want of an answer, a motion was made on his behalf that he might be at liberty to deliver up the bond to the plaintiffs to be cancelled; and that thereupon, and upon the defendant's paying the

costs of the plaintiffs, and of all other parties to the cause, and upon his undertaking forthwith, at his own costs and charges, to enter up satisfaction upon the record of the judgment, the writ of attachment and commission of rebellion might be discharged, and all further proceedings in this cause might be stayed.

The motion was opposed, on the ground that the defendant was in contempt, and therefore could not be heard until he had cleared such contempt, by putting in his answer. But his Honour the Vice Chancellor, after argument, overruled the objection, and made an order in favour of the defendant.

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*In Dec. v. Hicocks. 5 Mass & W. 303 & see
note & case 47 & 6. E. 517.*

April 22nd.

c. 6. - 153 -
BRADSHAW v. BRADSHAW.

JOHN BLAGROVE, Esquire, by his will, dated the 3rd February, 1824, gave and devised all his estates in the island of Jamaica, with the slaves thereto belonging, unto trustees, their heirs, executors, administrators, and assigns, upon trust to manage those estates for the term of three years from the day of his death, and out of the rents, issues, and profits thereof, to pay during the said term certain annuities to which his wife was entitled under her marriage settlement, and to stand possessed of the residue of the rents and profits accrued during the said term, upon the trusts thereafter mentioned. And he did thereby further declare, that from and after the expiration of the said term of three years, his said trustees, their heirs and assigns, should stand and be seised and possessed of his said plantations and estates in the island of Jamaica, in trust, in the first place, for better securing the annuities payable to his wife, and subject thereto upon the trusts following; that is to say, as to his two-third parts of the plantation and estate called Cardiff Hall, upon trust that they the said trustees should from time to time, so long as Robert Blagrove Bradshaw, the second son of his dear daughter Eliza, the wife of James Bradshaw, should be under the age of twenty-one years, by and out of the rents and profits of the said last-mentioned hereditaments, pay and apply the yearly sum of 150*l.* for and towards his maintenance and education; and from and after his said grandson, Robert Bradshaw, should attain his

Testator devised an estate in Jamaica to trustees upon trust, so long as Robert B., the second son of his daughter E. B., should be under the age of twenty-one years, to pay and apply 150*l.* per annum out of the rents and profits for his maintenance and education, and subject thereto upon various other trusts, in favour of his daughter E. B., and his said grandson Robert B.; and, subject to all those trusts, in trust for the said Robert B. for life, with remainder to his first and other sons in tail male, with remainder in moieties in favour of H. C. and R. C., the second and third sons of his daughter J. C., and their issue. The testator also devised his estate in England in trust for his said daughter E. B., for life, with remainder to his said grandson Robert B. for life, with remainder to his first and other sons in tail male, with remainder to the third, fourth, fifth, and every other son of the said E. B., severally and successively in tail male, with remainder to the testator's right heirs. E. B. had no second son named Robert. The name of her eldest son was Robert, and that of her second son Henry:—Held, under the circumstances, that this was a mistake in the name, and not in the description of the devisee; and consequently, that Henry, and not Robert, was entitled to take under these devises; and parol evidence was admitted to explain the ambiguity.

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said age of twenty-one years, should, during the joint natural lives of his said daughter Eliza Bradshaw, and his said grandson Robert Bradshaw, out of the said rents and profits, pay unto his said grandson or his assigns, the yearly sum of 300*l.*, for his and their own use and benefit, and pay the residue of the rents and profits to his daughter Eliza Bradshaw, for her separate use during her life; and the testator declared, that, after his said daughter's decease, the trustees should stand seised and possessed of the last-mentioned hereditaments, upon trust out of the rents and profits to pay the annual sum of 150*l.* for the maintenance of his said grandson, Robert Blagrove Bradshaw, until he should attain his said age of twenty-one, and after that period the annual sum of 300*l.* until he should attain the age of twenty-five, the surplus rents to accumulate in the interim; and he directed that when and as soon as the said Robert Blagrove Bradshaw should attain the age of twenty-five, but not sooner, he should be let into the possession of the whole of the rents and profits of the last-mentioned premises; and, subject to the trusts aforesaid, he declared that his trustees should stand possessed of the said last-mentioned premises, in trust for the said Robert Blagrove Bradshaw for life, with remainder to his first and other sons in tail male; with remainder, as to one undivided moiety, in trust for his grandson, Henry Coore, second son of his daughter Isabella Coore, widow, for his life, with remainder to his first and other sons in tail male; with remainder to his grandson Richard Coore, third son of his daughter Isabella Coore, for life; with remainder to his first and other sons in tail male; with remainder to the right heirs of the testator. The other undivided moiety was limited in the same manner, except that Richard Coore took first under that series of limitations. A power of jointuring was then given to Robert Blagrove Bradshaw.

The testator then declared, that the trustees should,

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after the expiration of the said term of three years, stand seised and possessed of his plantation called the Orange Valley Estate, other part of his Jamaica estates, upon certain trusts, for the benefit of his daughter Isabella Coore, and for the maintenance and education of his two grandsons, Henry Coore and Richard Coore, and, subject thereto, in trust for his said grandson, Henry Coore, for life; with remainder to his first and other sons in tail male; with remainder to his grandson, Richard Coore, for life; with remainder to his first and other sons in tail male; with remainder to his said grandson, Robert Blagrove Bradshaw, for life; with remainder to his first and other sons in tail male; with remainder to the testator's right heirs.

The testator then declared, that his trustees should, subject to the said term of three years, stand possessed of the estate called Upper and Lower Magotty, upon certain trusts, for the benefit of his daughters Charlotte Parkin and Ann Caroline Blagrove, and his grand-daughter, Charlotte Elizabeth Parkin, and, subject thereto, in trust for Charlotte Parkin for life, with remainder to her first and other sons in tail male; with remainder to Robert Blagrove Bradshaw for life; with remainder to his first and other sons in tail male; with remainder to the testator's right heirs.

The testator then gave and devised to the same trustees and their heirs, his messuage and lands called Great Abshott, situate at Titchfield, in the county of Hants, upon trust, to pay the rents and profits thereof to his said daughter Eliza Bradshaw, during her life, for her sole and separate use; and after her decease, he declared that his trustees should stand seised of the last-mentioned hereditaments, in trust for his said grandson Robert Blagrove Bradshaw, and his assigns, for his life, with remainder to his first and other sons in tail male; with remainder to the third, fourth, fifth, and every other son of the said Eliza Bradshaw, severally and successively in

tail male; with remainder to the right heirs of the testator. And the testator declared his mind and will to be, that an inventory should be made and taken by his executors, as soon as conveniently might be after his decease, of all and singular his household goods and furniture, plate, linen, books, and china, which should be in, upon, or about his said messuage or tenement called Great Abshott, at the time of his decease. And he gave and bequeathed the full use and enjoyment of the articles and things comprised in such inventory to such person or persons who should for the time being be entitled, under the limitations aforesaid, to the possession and enjoyment of the same messuage or tenement; the said articles and things to be considered as heir-looms; and to attend and follow the said limitations as far as the rules of law and equity would permit.

The testator died in 1824, leaving his daughter, Eliza Bradshaw, surviving him. At the time of the testator's death she had three sons; Robert Blagrove Bradshaw, who was her *eldest*, not her *second* son, as stated in the will; Henry, who was her *second* son, and Frank. She never had any other sons. Robert Blagrove Bradshaw died in 1827, aged ten years, never having been married. The testator also left his daughter Isabella Coore surviving him: she died in 1831, leaving three sons; Frederick, who was her *eldest* son; Henry John, (called in the will Henry), who was her *second* son; and Richard John Lechmere, (called in the will Richard), who was her *third* son. She never had any other sons.

By the decree in this cause made in July, 1835, it was referred to the Master to inquire who was the person meant and intended by the testator, under the name and description of Robert Blagrove Bradshaw, the *second* son of his daughter Eliza, the wife of James Bradshaw, and under the description and name of his grandson Robert Blagrove Bradshaw.

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The Master having examined Mr. Pennock, the testator's solicitor, made his report in substance as follows:—

For some years previous to his death, Mr. Pennock was the solicitor of Mr. Blagrove, the testator. In August, 1821, the testator having consulted Mr. Pennock respecting his will, that gentleman prepared for him a draft will, marked E, in which blanks were left for the names of the devisees, and a note written by Mr. Pennock in the margin, "Please to insert the Christian names." This draft was sent to the testator on the 20th of August, and was soon afterwards returned by the testator with several alterations in pencil, and with a note in pencil in the testator's handwriting, as follows: "Blagrove plate to Robert Blagrove Bradshaw, eldest son of Eliza Bradshaw." The testator did not fill up the blanks in this draft; and on one or two occasions, being asked by Mr. Pennock for the names of his grandchildren, said he did not know their names, but would get them.

In October, 1821, the testator had several more interviews with Mr. Pennock respecting his will, when the latter recommended him to have it settled by counsel. The testator wishing to have the matter kept secret, it was arranged that draft E should be copied with fictitious names, and the copy laid before counsel. This was accordingly done; the name of "Archdale" being substituted for that of "Bradshaw," "Lindell" for that of "Blagrove," and "Jones" for that of "Coore." This draft having been settled, it was again copied, the real names being inserted, and the last-mentioned draft, marked F., was signed and published by the testator as his will, on the 7th of December, 1821. Previous to such signature and publication, the testator gave to Mr. Pennock the name of Robert Blagrove Bradshaw, as the eldest son of his daughter Eliza Bradshaw, and Frederick Coore, as the eldest son of his daughter Isabella Coore, and they so appeared in the will; but many other blanks

remained, the testator not recollecting the Christian names of his grandchildren.

This will was not intended to be final, but was merely executed to meet the event of a sudden demise, and accordingly a fair copy of it was laid before counsel, with fictitious names, as before, for the purpose of a final settlement, which, however, did not then take place.

In October, 1822, the testator informed Mr. Pennock, that, in consequence of the great depreciation of West India property, he should be obliged to make material alterations in his will, and he directed Mr. Pennock to make a codicil to his will of December, 1821, which was accordingly executed by the testator. On the 22nd of November, 1823, he wrote a letter to Mr. Pennock, part of which was in the words following:—"Please to make a rough draft in one section to this devise alone, in the mode I did devise, benefit to the eldest son of Mrs. Coore; draw out such interest to become the benefit of his two younger brothers, as joint-tenants, in lieu of him, Frederick, who, in this section, need not even be named. Draw it, that, if one brother be minded to sell his interest in the estate for his natural life to the other brother, that he shall have liberty so to do—but to no other than to his brother in joint tenancy. If the brother that purchases the estate shall die without male issue, the estate to devolve to his brother, the joint tenant, and his heirs. If both these younger brothers die without male issue, such interest to devolve to the possessor and heirs of Cardiff Hall Estate, these estates lying contiguous to each other." In a letter dated the 26th November, 1823, he wrote as follows: "We may make progress in the rough section of the devise of Cardiff Hall and Unity Estates, negroes, stock, &c., to James Blagrove Bradshaw, in failure of male issue, with power to settle 400*l.* to wife, and 1000*l.* to daughters, to devolve to the possessor of Orange Valley Estate, and Orange Valley Pen, Pear Tree Bottom, and

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Bellair Properties. The possessors of these estates (if I recollect correctly) were to pay over to James Blagrove Bradshaw or his heir, 10,000*l.* sterling, or 7000*l.* to render these devises more equal in value one to the other. Now, I pause as to this bequest, thinking this or some other sum should be distributed among the joint tenant's sisters, conceiving the Bradshaws will be amply provided for after their grandfather's decease; and more particularly that now it will be settled that Abshott Estate shall devolve to James Blagrove Bradshaw in tail male, the annuity settled upon Absbott Estate being lapse; and the devise altered in favour of J. B. Bradshaw, as just above contemplated, shall burthen this property 150*l.* per annum, liable to Mrs. Blagrove's annuity." In this letter the word *James* was altered into *Robert* by Mr. Pennock at his next interview with the testator.

During the discussions which took place about the time when these letters were written, the testator declared to Mr. Pennock his intention of making a provision for the second son of his daughter Elizabeth Bradshaw, in lieu of the provisions he had made for the eldest son, assigning as a reason that her eldest son would be amply provided for by Captain Bradshaw, her husband's father. The testator accordingly instructed Mr. Pennock to make the necessary alterations, and Mr. Pennock took rough notes or memorandums of the testator's instructions whilst he was with him. In these notes Robert Blagrove Bradshaw was named as the party to take the Cardiff Hall Estate in tail, and the remainder in tail in the Orange Valley Estate, subject to estates in tail male in the Coores. As to the Abshott estate, Mr. Pennock's note without the erasures ran thus:—"Abshott Estate.—To Mrs. Bradshaw, and after her decease, to her son Robert, remainder to his heirs in tail male, remainder to his brother in succession in tail male; he has several brothers, 2nd, 3rd, 4th."

Instructions, pursuant to these notes, were afterwards

laid before counsel for the purpose of making a new will. The same fictitious names were used as before. The instructions began with these words: "Mrs. Archdale's eldest son has an ample fortune from his paternal grandfather. The testator consequently intends to provide for her second son, Robert Lindell Archdale, who is now an infant." Throughout the instructions, Robert was named as the party to take the Cardiff Hall estate, &c., pursuant to the notes.

In pursuance of these instructions a new draft was settled by counsel, with fictitious names, as before. These names were afterwards replaced by what Mr. Pennock conceived to be the real names of the devisees; and amongst the names so changed was that of "Robert Lindell Archdale" into "Robert Blagrove Bradshaw." A fair copy was then made from the draft so altered, and that fair copy was the will, signed and published by the testator in February, 1824, and the subject of the present suit.

In addition to these facts, the Master found in substance as follows:—that the testator never had any grandson of the name of James Blagrove Bradshaw, and that the person meant to be designated by that name in the testator's letter, and the person whom Mr. Pennock meant to describe when he interlined the word Robert in the said letter, and the person whom he meant to describe by the name of Robert Blagrove Bradshaw in his rough notes or memorandums, was the second son of the said testator's daughter, Elizabeth Bradshaw, and not her eldest son; and that the second son of Elizabeth Bradshaw was intended to be the object of the testator's bounty: that the reason why, in the draft from which the last will was taken, Robert Blagrove Bradshaw was named and described as the second son of the testator's daughter, Eliza Bradshaw, was, that Mr. Pennock supposed that Robert Blagrove was the correct name of Eliza Bradshaw's second son, the

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said former draft wills marked E and F, in which Robert Blagrove Bradshaw was mentioned as the eldest son of the said testator's daughter, not being referred to; the said draft E having been, no doubt, laid aside as soon as the copy was made of it for counsel's perusal, and the draft marked F having been in all probability put aside for safe custody as soon as the same had been executed by the testator.

Upon the whole, the Master certified that he found that the said Henry Bradshaw was the person meant and intended by the said testator, under the name and description in his will of Robert Blagrove Bradshaw, the second son of his daughter Eliza, the wife of James Bradshaw, and under the description and name of his grandson, Robert Blagrove Bradshaw.

To this report the defendants, Henry John Coore, and Richard Lechmere Coore, took an exception, on the ground that the Master ought to have certified that Robert Blagrove Bradshaw in the Master's report, and in the pleadings of the cause named, but now deceased, was the person meant and intended by the said testator under the above name and description.

Mr. Boteler, and Mr. Phillimore, for the exception.—The eldest son of Eliza Bradshaw is intended to take under the will. Even if there were any doubt upon that point, Pennock's evidence is not sufficient to warrant the alteration of the name of the devisee, all through the will. The pencil note made by the testator in draft E, shews that he knew that Robert Blagrove Bradshaw was the eldest son. The purport of that note is to leave the Abshott plate to Robert; and, in his will, the testator gives the Blagrove plate to the owners of the Abshott estate. These two circumstances combined, clearly shew that the Abshott estate, at all events, was to go to the eldest son. Besides, Mr. Pennock's rough note as to the Abshott

estate, corroborates that view of the case; he treats Robert as the eldest son, observing that "he has several brothers, second, third, fourth."

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Mr. *Simpkinson*, and Mr. *G. Richards*, for the report.—
 The Master is right on the evidence; but, independently of the evidence, the true construction of the will is on the Master's finding. The question is, whether the person who answers the description of the second son, or the person whose Christian name is properly stated, but who does not answer that description, is to take. It is admitted that, as this is a latent ambiguity, parol evidence is admissible to explain it.

The testator had three married daughters. By a will made antecedently to this will, he had devised his estates in the West Indies for the benefit of the eldest children of those daughters. The Cardiff Hall estate had been given to the eldest son of his daughter, Mrs. Bradshaw, (a blank being left for that eldest son's name), with remainder to his first and other sons in tail, with remainder over, in default of issue, to the devisees of the Orange Valley estate. The testator not knowing the names of all his grandchildren, blanks were left in the draft of that will. Many of them were not filled up when the testator executed that will. Even the devise to the eldest son of Mrs. Blagrove remained in blank till it was interlined by Mr. Pennock, immediately before the testator executed it. It is true that there is a memorandum in pencil on that draft will, in which the testator states that Robert B. Bradshaw is the eldest son of Mr. Bradshaw. But it is clear, from the testator's letters and conduct subsequent to his making that memorandum, that he had forgotten that Robert was the eldest son of his daughter, and that he had mistaken the names of his grandchildren, so as not to be able to furnish Mr. Pennock with materials for a second will. The letter of the 25th of November, 1823, in which he speaks of making

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progress in the devise of the Cardiff Hall estate to James Blagrove Bradshaw, there being no such person, proves, both that he was unacquainted with his grandchildren's names, and also that he intended an alteration in the devise to Mrs. Bradshaw's eldest son. If he did not contemplate such alteration, what occasion was there to make progress in the devise to him, when he was already to have the property? Besides, if he considered James to be the eldest son, he was as much mistaken in the name of the devisee on their construction, as on ours. [*The Lord Chief Baron*.—When the testator wrote that letter, he had either forgotten that Robert was the name of the eldest son, or he meant to change the devise.] He meant evidently to give the property to some other individual. He mistook the name of that individual, though he did not mistake the description. The mistake in the name is not remarkable, for even the names of the Coores are wrongly stated in the will. They appear with single Christian names throughout.

Then, assuming that the name used by the testator was used by mistake merely, the question is, whether, under all the circumstances, the party who is really the second son is entitled to take? If there were any doubt as to the evidence, the will itself is clear. The testator meant to raise two families, in whom the Bradshaw property was to remain distinct from that of the Coores: but he also meant to make the second son of each of those houses the object of his bounty. He therefore, in the first instance, devises the Cardiff estate to the second son of Mrs. Bradshaw, with remainder to the second and third sons of Mrs. Coore. He next devises the Orange Valley estate to the second and third sons of Mrs. Coore, with remainder to the second son of Mrs. Bradshaw. When he comes to the Magotty estates, he devises them differently. The reason why the second sons are preferred as to the other estates does not apply in that

instance. He therefore devises those estates to Mrs. Parkin and her children, with remainder simply in favour of Robert B. Bradshaw and his issue. When we come to the Great Abshott estate, it is clear that the testator meant all along to exclude the eldest son of Mrs. Bradshaw; because he gives that estate to Eliza Bradshaw for life, with remainder to his said grandson Robert B. Bradshaw for his life, with remainder to his first and other sons in tail male, with remainder to the *third, fourth, fifth*, and every other son of his daughter, Mrs. Bradshaw, in tail male. This not only shews that the second son was intended to take in the first instance, but it clears up the objection arising from the words of Mr. Pennock's memorandum. This limitation in the will corresponds with Mr. Pennock's idea, that, besides the second son of Mrs. Bradshaw, there were three other sons. It is true that in the rough note or memorandum which he took at the moment, he stated them as second, third, and fourth, and in the will itself they are stated as third, fourth, and fifth, but the variation is not such as the Court will, under the circumstances, regard as important, or consider as having originated in any thing beyond mistake in the solicitor.

If the construction contended for on the other side is to prevail, it is clear, that, as regards the Abshott estates, the second son of Mrs. Bradshaw must be excluded, although the third, fourth, and fifth may take. What could be the object of excluding a second son? One can understand that an elder son may be excluded, because the party may have property coming to him from another source; but that reason cannot generally apply to the case of a second son.

Mr. Boteler, in reply.—We must collect the meaning of the testator to have been, that Robert Blagrove Bradshaw, personally, should partake of his bounty. The

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question is not whether the eldest or second son should take, but whether Robert, the person named in the will, should take, or, Henry, the second son, the party described by relationship, should take. It is clear that the testator, in the first instance, knew who was Robert B. Bradshaw. Afterwards, in September, 1823, he talks of making some alteration in his will. In the first letter which he writes, he explains what that alteration is. It relates only to the devise which had before been made to Frederick. When he alludes to the Cardiff Hall estate, he speaks of the possessor of it without mentioning any alteration in that devise. It is said, indeed, that the subsequent letter proves that an alteration was intended in the devise of the Cardiff estate, because, otherwise, a rough section of that devise would not be wanted. That, however, is but weak evidence of such intended alteration. The change of the name from Robert to James might, certainly, be evidence of an intention to devise to somebody else; but, on the other hand, it might prove no more than that the testator had forgotten that Robert was the eldest son. Suppose, however, that the testator meant to substitute another person; how happened it that, when he and Mr. Pennock met again, the name of James was struck out, and Robert inserted in pencil? After all, the only material alteration intended to be made related to the Abshott estate. That had, by the former will, been given to some persons of the name of Hawkins, and it was now intended to be given to the Bradshaws. There is no evidence, either by the letters or otherwise, that the devise of the Cardiff Hall estate was to be altered. The argument that the testator meant to favour the second sons of each house, entirely falls to the ground, when it is considered that, in the first will, there were the same limitations to the eldest sons of each house.

It is clear, from all the circumstances, that the testator favoured that grandson who bore his own name. Through-

out the whole will, till you come to the devise of the Abshott estate, Robert B. Bradshaw is only once described as the testator's second son. In all other parts he is called his "said grandson." In this, the testator makes a distinction between that grandson and the Coores, who are several times named as the second and third sons of Mrs. Coore. The same inference may be drawn from what took place in the communications between the testator and his solicitor. How, then, was it possible that, when Mr. Pennock committed the result of these communications to paper, he should have supposed Robert B. Bradshaw to be any other than the eldest son? He could not have overlooked a name so perpetually recurring. His very memorandum proves that he did not regard him in any other light, and why he should have given instructions to counsel differing from those which he had received from the mouth of the testator, it is impossible to tell. With respect to the will itself, there is nothing as regards the devisees of the Cardiff Hall and Orange Valley estates, which shew that Robert was less an object of the testator's bounty than Henry. But it is attempted to draw that inference by referring to the devise of the Abshott estate; and it is said, that, if Henry takes that estate under the will, he must also take under the devises of the other estates, or the will will be inconsistent. But, whatever might be the effect of that clause under other circumstances, it is to be remembered that the whole of this will has been drawn from mistaken instructions, and therefore there is no particular reason for putting a construction on the latter clause favourable to the second son. If, according to our construction, the omission of the second son cannot be accounted for, it is equally difficult on their construction to account for the omission of Frederick. But the omission of both may be accounted for on the very ground on which they rely: namely, that the Bradshaws were amply provided for.

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The LORD CHIEF BARON.—If I entertained any doubt about the integrity of Mr. Pennock, or if this instrument, which was made from instructions given to him, had been prepared and executed at some distance of time from the period when the conversation took place between him and the testator, I should hardly venture, upon the parol evidence alone, to decide this point without directing an issue. But it is admitted that Mr. Pennock is a man of integrity: I must say therefore, that it is probable, if an issue were directed, that the jury would draw the same inference on the subject that I have done. But the parol evidence is not the only matter deserving of consideration. The will itself furnishes observations to shew that the testator meant to provide for his daughter's second son.

It is quite clear that the testator either mistook the name of the second son to be Robert, or, if he meant Robert, he mistook him to be the second son; that is to say, he mistook either the name or the description of the individual whom he intended should take. It has generally been found, where mistakes have been assumed to have been made either in the name or description of the devisee, or the property devised, that the mistake has been made in the name and not in the description. In devises of real estate, where a testator has mistaken the name of the county where the lands lie, but yet has given such a description of them that the mistake can be explained, the description has been held to prevail over the mistake in the name. Thus, where a testator has devised lands in the county of A., which he purchased of a certain individual, to one person, and his lands in the county of B. to another person, and it turns out that the lands purchased lie in the county of B. and not in that of A., Courts of justice have gone so far as to transpose the names of the counties.

If a party means to describe a particular object which he has in view, he is more likely to be correct in descrip-

tions than in names. It seems to me that the truth of that observation very much applies to the present case. It is clear that Mr. Blagrove did not know, or at least, at one time, if he ever knew, had forgotten the name of the eldest son of Mrs. Bradshaw. The devise is to Robert Blagrove Bradshaw, as the second son of Elizabeth Bradshaw. It is true, that afterwards there is no repetition of the words "second son," as applied to him, but only the words "said grandson." In the argument for the exception, the absence of that repetition has been much dwelt upon; but I know not how to place much weight in that circumstance. If the testator had repeated those words, no doubt that would have been important to shew his intention to continue in the same plan of disposition. But it is not necessary to have that evidence, because it is clear that he means the grandson whom he has before described. Then as to the Abshott estate, supposing in the absence of all evidence the question to be, who was intended to take, the second son not being named—you would say, which did he mistake, the name or the description? Evidently the name. In the last devises he mistook the name and not the description. He there devised to the second son of his daughter, by the name of Robert. Here, he devises to the second son of his daughter in the same manner; and when he comes to devise the Abshott estate in failure of issue of his said grandson Robert, he devises it to the third, fourth, and other sons of his daughter; thereby shewing that he understood he was devising in the first instance to her second son, and not to her eldest.

The testator is represented to have been an intelligent man, and I presume he read his will. If he did, he must have known that he was devising to the second son of his daughter, and that, in the ultimate devise of the Abshott estate, he was devising to the third and fourth sons of his daughter, as he had before devised to her second son.

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If I must presume that he made a mistake one way or the other, why should I not presume that he made a mistake in the name? This is either a devise to the second son by a wrong name, or to the eldest son by a wrong description; but even if there were no evidence, I should be strongly inclined to think that the precise description of the second son was less likely to be erroneous than the name. Supposing the testator had used the words "second son," without any thing else, there would have been no doubt. Suppose, again, he had used the name of Robert only in the devise of the Abshott estate, you would have said he took him for the second son. Then does the present frame of the will make any difference?

Then with respect to the evidence. The whole argument of the party contending that there is a mistake in the description, is founded on the construction of the written memorandum made by Mr. Pennock, when, as he stated, he was in communication with the testator. There would be a great deal in that argument if it stood alone; but to come at a right conclusion, the whole of the evidence must be examined. The parol evidence clearly proves that the testator made a mistake in the name of the devisee. It should seem that he originally knew nothing of the names of his grandchildren. He afterwards, it appears, knew that the name of the eldest son was Robert. Assuming that he knew that fact in 1821, what followed? In November, 1823, he wrote a letter in which he either supposed the name to be James, or from which it is clear that he did not mean to devise to the eldest son. If he meant to devise to a different person, who was that different person except the person described in the will? Assume that it was an altered devise in favour of some person not named before; who was that person but the person described in the will—namely, the second son? If the mistake be in the name, it lets in parol evidence; and Mr. Pennock declares he understood Robert to be the second son. He swears he

believed that to be the fact. Whether, therefore, he had the former draft before him or not, would leave that belief unsuspected. At one of his interviews with the testator, conceiving that the testator had made a mistake, and had said James instead of Robert, he struck out the word James and inserted that of Robert, still believing Robert to be the second son. You have therefore the person who made the will swearing to the circumstances under which the name of Robert was inserted. All you have against that evidence, is the written memorandum, which has been so much relied on. But that will not outweigh the strong evidence of Mr. Pennock. It appears to me that there is nothing in this case to explain why, if the testator meant to give the property to the eldest son, he should have given it to the second.

Mr. Pennock's evidence is of the more importance, because it is plain that he took down his memorandums at the time of receiving his instructions from the testator. The memorandums are such, that no one could have made them except those who took them down. However obscure they might be, yet if he took them down at the time, and very shortly after prepared instructions from them for counsel, they would well assist his memory. It appears to me also that Mr. Pennock's account is not contradicted but confirmed by Mr. Blagrove's letter, from which it seems clear that he meant to provide for those who were likely to be least provided for. In this letter he states the Bradshaws to be rich, which is an additional circumstance against construing this devise in favour of the eldest son.

Upon the whole, I think that a jury, after hearing the evidence of this gentleman who was the testator's solicitor, and who took down his instructions in writing, would come to the same conclusion as the Master.

Exception overruled.

See Doe d. Le Chevalier v. Huthwaite, 3 B. & Ald. 632.

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Testatrix bequeathed an annuity of 100*l.* to her niece for life, and charged the same upon her leasehold property in Wimpole Street and all and every her residuary personal estate and effects whatsoever, save and except her leasehold premises at R. — *Held*, that this was a demonstrative legacy.

ELIZABETH GOODLAD, by a codicil to her will, after bequeathing an annuity of 100*l.* to trustees upon trust to pay the same by equal quarterly payments to her niece for her life, free from the control, debts, and engagements of her then present or any future husband, proceeded to provide for the payment of the annuity in the following words: "And I do hereby charge and make the said annuity of 100*l.* chargeable upon and issuing and payable out of my leasehold messuage or tenement and premises, with the appurtenances, situate in Wimpole Street aforesaid, and my present and future terms, estates, and interests therein, and all and every my residuary personal estate and effects whatsoever and wheresoever, save and except my leasehold property and premises at Richmond, in the county of Surrey."

The question was, whether this legacy was pecuniary, in the ordinary sense, or demonstrative. In the latter case, payment of the annuity in full would be secured to the annuitant, notwithstanding there was a prospect of a deficiency in the testatrix's assets.

Mr. *Lynch* and Mr. *Cory*, for the plaintiff—If the clause at the end of the bequest, commencing with the words "and all and every my residuary personal estate," had been omitted, no doubt this would have been a specific legacy; but it will be contended that these words make it pecuniary. It is not pecuniary, but demonstrative; that is to say, it is payable out of particular property in preference to other legacies, but payable at all events; not partaking of the character of a specific legacy so far as to fail in case of the fund out of which it is primarily payable being lost. Here, the primary fund for payment is the

property in Wimpole Street, but if that should fail, the deficiency must be made up out of other parts of the estate of the testatrix. The authorities for this construction are *Roberts v. Pocock* (a), *Acton v. Acton* (b), *Mann v. Copeland* (c), *Smith v. Fitzgerald* (d), *Fontaine v. Tyler* (e).

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Mr. *Skirrow* and Mr. *Sidebottom*, for the defendant.—In the cases which have been cited, the intention of the testator to make the legacy payable at all events, was much more apparent than it is on the face of this will. In *Roberts v. Pocock*, the testator stated distinctly, that, be the events what they might, the legacy should be paid. In *Mann v. Copeland*, there was a manifest intention to give the 10*l.* a-year under any circumstances. Here, the testatrix meant to do no more than enumerate particular parts of her property. The house must be sold for the payment of the legatees generally.

Mr. *Bligh* and Mr. *Heberden*, for other parties.

Mr. *Lynch*, in reply.

ALDERSON, B.—My present impression is, that this is a demonstrative legacy; but I will postpone my judgment for a few days, in order to look into the authorities.

ALDERSON, B.—In this case I thought it advisable to take time to consider whether the annuity bequeathed to the plaintiff, and charged upon the leasehold premises in Wimpole Street, was to have a claim upon those premises prior to the other legacies given by the will, or whether

May 5th.

(a) 4 Ves. 150.

(c) 2 Madd. 223.

(b) 1 Mer. 178.

(d) 3 Ves. & B. 2.

(e) 9 Price, 94.

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they are all to be put on the same footing. And on looking at this will, and examining the authorities, it appears to me that this legacy is entitled to the priority claimed for it on the part of the plaintiff.

There is no doubt that, strictly speaking, this is not a specific legacy. It is a pecuniary legacy, and payable at all events; and if the leasehold premises mentioned had been disposed of in the lifetime of the testator, the legacy would nevertheless not have failed. But the cases establish that, notwithstanding a legacy may be pecuniary, yet it may still have priority if it be charged by the testator on specific property; and in that case, as the Master of the Rolls says in *Smith v. Fitzgerald*, the same legacy may be both specific and pecuniary. And according to the cases of *Acton v. Acton*, and *Roberts v. Pocock*, it would have priority over other legacies in respect of the property on which it is specifically charged, subject only to the payment of the testator's debts.

I think, therefore, that, as to this part of the case, there must be a decree as prayed by the plaintiff.

On the other parts of the case the parties are agreed.

Decree accordingly.

April 28th.

BLACKBURN v. WARWICK and Wife.

Where the interest due upon a mortgage had become in arrear, and in the mortgagee's account of arrears, rests were made from time to time, on which interest was calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, was signed by the mortgagor and confirmed by a deed, executed by him three years afterwards, for securing repayment of the balance to the mortgagee:—*Held*, that these transactions were not usurious, and that the mortgagor was liable for the balance.

^{1832 - 1832.}
THE defendants being seised of certain copyhold lands in right of the defendant, Mrs. Warwick, executed a mortgage of those premises, dated the 1st May, 1795, for securing to Quentin Blackburn the repayment of 1100*l.* and interest. In 1801 the defendants further charged the same premises with a sum of 900*l.* and interest, which

Where the interest due upon a mortgage had become in arrear, and in the mortgagee's account of arrears, rests were made from time to time, on which interest was calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, was signed by the mortgagor and confirmed by a deed, executed by him three years afterwards, for securing repayment of the balance to the mortgagee:—*Held*, that these transactions were not usurious, and that the mortgagor was liable for the balance.

had been advanced to them by the same party. They at the same time executed certain indentures of lease and release, bearing date the 29th and 30th October, 1801, charging certain freehold lands with these sums. In 1802, the interest on these sums became in arrear; and although the mortgagee frequently applied for, and occasionally obtained some payments in respect of interest, yet the arrears continued to increase for several years afterwards. The mortgagee entered these arrears and payments in his books, and from time to time made rests on the arrears, and calculated interest thereon. It was alleged, but that did not appear, except by the entry hereafter noticed, that settlements were come to between the mortgagor and mortgagee, at the respective times of making those rests, the mortgagee agreeing not to sue the mortgagor in consideration of interest being allowed to him on the rests.

In 1813 Quentin Blackburn died, having by his will appointed Quentin Blackburn, his son and heir-at-law, to be his executor. In November 1816, Blackburn, the son, as it appeared from an entry in his books, settled an account respecting the mortgage with the defendant Thomas Warwick. The entry was signed by Warwick, and apparently confirmed the previous settlements alleged to have been made with Blackburn, the father. Upon this settlement the sum of 1500*l.* appeared to be due to the mortgagee for arrears; and by an indenture bearing date 15th March, 1819, and executed by Warwick, the repayment of this sum as well as of the former sums, was secured to the mortgagee.

On the 1st January, 1826, Blackburn, the son, died; having by his will, dated in 1822, devised all his real and personal estate to the plaintiffs, and appointed them his executors. A bill of foreclosure was then filed by the plaintiffs against the defendants; but shortly after the institution of that suit, the defendants proposed a compromise. This was consented to upon terms; and the

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defendants then executed indentures of lease and release, dated the 5th and 6th November 1827, by which, after reciting that 3500*l.* was secured by a former deed, and 500*l.* was due for arrears of interest, and after reciting the suit in the Exchequer, they conveyed to the plaintiffs the fee-simple of the premises in trust, in default of regular payment of the interest, for sale and satisfaction of the debt out of the proceeds. A fine was levied of Mrs. Warwick's interest in the premises.

The interest having become again in arrear, the plaintiffs, in Michaelmas Term, 1830, brought their action of ejectment to recover possession of the premises. Before judgment was obtained, the defendant, Thomas Warwick, agreed to attorn to the plaintiffs, as tenant, at 200*l.* a-year, which they consented to. No rent or interest, however, was paid; and, after a long correspondence between the parties, the property was put up for sale, but met with no bidder. The present bill was then filed, suggesting that the sale had been prevented by means of the defendant Thomas Warwick having spread reports reflecting on the title to the premises, and praying that the deeds of 1827 might be carried into execution under the decree of the Court.

The defence set up was, that the deeds of 1816 and 1827 were usurious and void.

Mr. Simpkinson and Mr. Phillimore, for the plaintiffs.

Mr. Boteler and Mr. O. Anderdon, for the defendants.—The original mortgage and further charge are not objected to, but the subsequent settlements are usurious; and even the acquiescence of the defendants in those settlements will not render them valid. The bill treats the case as if the mortgagor and mortgagee had met together and agreed to turn interest into principal; but it is clear that the books were not seen by Warwick till 1816. The balances

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are drawn up in such manner as a Court of equity will not permit. Had the plaintiffs taken simple interest from 1803 to 1816, and then a new deed had been executed converting interest into principal, there would have been no cause of complaint. But, as a mortgagee cannot stipulate *a priori* that he will make rests from year to year and convert interest into principal, so neither is such a conversion allowable, except at long intervals, even without a previous stipulation, and with the consent of the mortgagor. This may be inferred from the opinions of Lord *Thurlow* (a) and Lord *Eldon*. In *Chambers v. Goldwin* (b), the latter learned Judge says, "There is nothing unfair, or perhaps illegal, in taking a covenant originally, that if interest is not paid at the end of a year, it shall be converted into principal; but the Court will not permit that as tending to usury, though not usury." [*Alderson*, B.—I do not exactly see how a thing which is not usury tends to usury. It is not a very strong opinion. Does it go beyond this, that, except you can infer it upon the custom between the parties, interest upon interest cannot be calculated in the case of a mortgage? If you could make out that no previous contract or arrangement had been executed, but that every thing was done in November, 1816, you might have some ground for argument; but the question is, whether the Court may not reasonably infer that from time to time there were arrangements between the parties?] The accounts were kept and the receipts made out in the mortgagee's books; and, except in one instance, it does not appear that the defendant ever signed them. This is not an account between merchants or bankers, but simply between mortgagor and mortgagee. In such cases, although, as Lord *Thurlow* said, there is perhaps no good reason why interest upon interest should not be allowed, still, it is contrary to the practice of Courts of equity to allow it.

(a) *Ex parte Champion*, 3 Bro. C. C. 436.

(b) 9 Ves. 271.

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[*Alderson*, B.—Usury is a creature of the law, which in that respect must be obeyed, but no more. In my judgment, if taking interest upon interest is not usury, it is nothing at all but a laudable practice. If the parties have chosen to make an equity for themselves, why should I set it aside?] The defendants are in the situation of persons under the protection of a Court of equity; and being in that situation, the mortgagee has taken the account in a way he ought not to have done. In *Sackett v. Bassett* (a), a case in many respects like the present, Sir *Thomas Plomer* thought the question sufficiently doubtful to direct an issue. In *Thornhill v. Evans* (b), Lord *Hardwicke* held, that rests could not be made while the relation of mortgagor and mortgagee existed, except upon the advance of fresh money. [*Alderson*, B.—There is no evidence stated in that case. Is there any case where a bargain of this description has been held to be extortion, upon the mere relation of mortgagor and mortgagee; or where a Court of equity has interfered to declare the transaction illegal where the parties have agreed to take interest upon interest at a subsequent period? Here, the interest first became due in 1802; and 100*l.* being due, a regular agreement was made between the parties that one would not sue for the 100*l.*, provided the other would agree to pay the 100*l.* with interest. If this was done from time to time, why should it not be done? The settlements were confirmed by the deed by which the 1500*l.* was raised.] The deed should have been executed at the time of the last settlement. Instead of that, it was not executed till 1819, which shews that the settlement was not an act of deliberation. There should have been a deliberate act, shewing the intention of the parties at the time. Besides,

(a) 4 Madd. 58.

(b) 2 Atk. 330.

the deed states the 1500*l.* to be a further advance, the recital being that all interest was paid, and that the defendants had occasion for a further sum. The whole transaction savours of oppression. This is not a bill of foreclosure, but for equitable relief. The plaintiffs coming into equity, must do equity. A creditor with a security and a power of sale is not entitled to the aid of a Court of equity to effectuate that sale. The plaintiffs, therefore, lay great stress upon the equitable consideration entitling them to come here for aid; but it is clear that if aid be offered, it must be upon equitable terms. If the plaintiffs have been overpaid, the Court, on the ground of oppression, will relieve the defendants to that extent, even though they may have assented to such payments: *Bosanquet v. Dashwood* (a).

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Mr. *Simpkinson*, in reply.—As to the alleged oppression, it does not appear that the mortgagee took any interest between the years 1816 and 1819, and then he took the deed for the 1500*l.* Besides, this was not an agreement extorted from a person out of possession, for Warwick was in possession of the rents and profits the whole time. Upon the question of usury, it is unnecessary to discuss the rules of equity in regard to agreements *a priori*; though it is difficult to understand upon what principle those rules depend. [*Alderson*, B.—In the case of a mortgage deed given *a priori*, there is a scintilla of principle; for you lend your money at 5*l.* per cent. *plus* a covenant; but I do not see how any principle drawn from an antecedent can apply to a subsequent agreement.] This is a subsequent agreement to put the party in the situation in which he would have stood if the other party had paid the money when he ought to have done so. Then the deeds of 1827, which actually recite the com-

(a) Ca. T.T. 38, 40.

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promise of the Exchequer suit, amount to a complete confirmation of all the preceding acts of the parties.

ALDERSON, B.—If I entertained any doubt upon the main question in this cause, I should take time to consider my judgment; but it appears to me that the plaintiffs are entitled to a decree, and that the only point of doubt is, whether the sale of these premises has been prevented by the defendants, and if so, whether this suit having been rendered necessary by their conduct, they ought to be made to pay the costs. Upon that point I shall not give my opinion at present, but will look into the evidence. Upon the main question whether or not they ought to be compelled to pay the whole amount of 4000*l.* secured by the mortgage deeds, I shall give my opinion immediately.

In the year 1795, the sum of 1100*l.* was advanced to the defendants by way of mortgage; and on the 13th of October, 1803, an additional security was given by them to the mortgagee to the amount of 900*l.* The interest fell into arrear, and it appears that in November, 1816, an account of the arrears was taken between the contracting parties. The account begins on the 31st October, 1803, with a balance of arrears, upon which interest is calculated. As the whole account was signed by Warwick, he must have acknowledged that on the 31st of October, 1803, there was that sum due to the mortgagee. The whole of the rests in question proceed upon the same footing. There is a rest in 1807, another in 1809, another in 1813, and the last in 1816; in all of which calculations were made of interest upon interest; and that was carried into effect by the allowance of the party himself. Therefore, admitting those calculations to be proper, the result is a balance due to the mortgagee of 3500*l.*, which was secured to him by express agreement.

Supposing, as is clear upon the evidence, that that account was signed by Warwick, and that he was furnished

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with a copy of the agreement, what evidence is there upon which the Court can rely arising out of the relative situation of the parties as mortgagor and mortgagee, to induce it to come to the conclusion that there was any oppression in this case? There is not enough to induce the Court to come to that conclusion, even in the original state of the transactions, but more especially when they are found to be based upon a regular agreement between the parties. Then, is there any thing illegal in the agreement itself? It is said, that if parties enter into an original agreement by way of mortgage, they cannot recover more than 5*l.* per cent. beyond the principal money, and that if they take a stipulation—that if the interest is not paid at the time, the mortgagor shall pay interest upon it until the arrears are paid—that is illegal. Now, in holding this to be the rule, I presume the Courts suppose that some advantage immediately accrues to the mortgagee under the deed, *ultra* the allowance of 5*l.* per cent. interest, and that that advantage being secured by an original stipulation, the contract savours of usury. If the rule cannot be supported on that ground, it appears to me that it cannot be supported at all. I confess I do not see why such interest might not be allowed, even where the stipulation to pay is contained in the original deed; but be that as it may, there the covenant being part of the original terms of the contract, is part of the original advantage accruing to the mortgagee, and the Courts will not sanction such a contract. So neither will the Courts allow interest upon interest where the party comes to an account with his debtor, which he afterwards seeks to enforce through the medium of a Court of equity. In that case it is considered that where parties who are entitled to the repayment of a principal sum with simple interest have neglected to enforce payment of the interest, that was their own omission, and the Court leaves them to take the consequences of that neglect, and will not give them an equity

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founded upon their own laches. That rule is consistent with equity and common sense ; but there is no reason why, if the parties settle the matter between themselves, and the one party gives time to the other for payment of the arrears in consideration of the allowance of interest on the balance, they should not afterwards be compelled to abide by that settlement. It seems to me, therefore, that they ought not to be permitted to come here to have such a settlement set aside. At all events, no case has been cited to that effect, and I shall not be the party to make a precedent of that nature, which if made, would, I think, be contrary to equity and common sense.

In the case decided by Lord *Thurlow*, and cited at the bar, it is observed by that eminent authority, in reference to cases where interest upon interest is allowed, that if the parties mean that the debt should carry that interest, they must say so by their agreement. Here, the parties have said so, and have carried their intention into effect by the deed of 1819. That provides expressly for interest being in future paid ; and if that is a settlement which a Court of equity ought to enforce, the subsequent deed of 1827, which is founded upon that, is a clear and valid contract between the parties, which ought to be carried into execution. The mortgaged property must therefore be sold, the balance due to be accounted for before the Master, together with legal interest.

On a subsequent day his Lordship said that he had looked into the evidence, and upon the whole he thought that the circumstances alleged respecting the prevention of the sale had not been made out so clearly against the defendant, Thomas Warwick, as to induce the Court to fix him with the costs of the suit ; and his Lordship directed that each party should pay their own costs.

Decree accordingly.

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BY the decree in this cause it was referred to the Master, amongst other things, to take an account of the rents and profits of the works, mines, and property, from the 1st day of October, 1825, allowing and deducting from the gross produce interest at the rate of 4*l.* per cent. per annum, upon the capital property employed by the British Iron Company in working the said mines; and the Master was to take an account of all money properly expended by the company in improvements in the said works, mines, and property, by the erection thereon of any new buildings, or the construction of any new works or machinery begun before the 20th April, 1826, or by making any additions thereto: and he was also to inquire and state to the Court what part of such money was expended in respect of work done before the 20th April, 1826, and what part was expended in respect of work done after the 20th April, 1826, and the several circumstances attending such expenditure after the 20th April, 1826. And he was also to inquire and state to the Court whether any and what improper waste, spoil, or destruction had been committed in or upon the works, mines, and property, or any and which of them by the plaintiffs, or by or through their neglect or default, since the time the plaintiffs had possession. And in case he should find that any such improper waste, spoil, or destruction had been committed, then he was to ascertain the amount and nature of such waste, spoil, or destruction, and the damage thereby done; and was also to inquire and state to the Court whether the trade had been improperly carried on by the plaintiffs since they had had possession of the said works, mines, and property; and in that case he was also to inquire and state to the Court whether any and what damage had been sustained by improperly carrying on

A suit having been instituted by a company of proprietors of iron-works to set aside the contract under which they had purchased the iron-works of the defendant, and the decree having directed an inquiry as to the net profits made by the company:—*Held*, that it was competent for the defendant, who had not been in possession for some years, to exhibit interrogatories before the Master, for the purpose of ascertaining in what manner the Company had managed the concern, without setting forth any specific statement of facts.

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the said trade, and the amount and nature of such damage, and the circumstances thereof. It was further ordered that all parties should produce before and leave with the Master, if required, all deeds, books, &c., in their custody, relating to the said accounts, and be examined upon interrogatories touching the same, as the Master should direct, and the Master was thereby armed with a commission as well for the examination of parties as of witnesses, touching the said accounts.

Very long and minute interrogatories having been exhibited in pursuance of this decree on behalf of the defendant, and the Master having certified that he had allowed those interrogatories, exceptions were taken by the plaintiffs to the Master's certificate in that respect. The exceptions were taken *seriatim*, applying to each interrogatory successively, and were seventy-two in number.

The first interrogatory which was the subject of exception, was as follows:—Was there any ironstone, coals, and other minerals, or any or either of them, in stock on the estate in the pleadings of this cause, called the Wolverhampton Colliery, on the 30th of September, 1825, and has not the said estate, since the 30th September, 1825, yielded or produced or had raised thereout divers quantities of ironstone, coals, and other minerals, or any or either of such particulars. Set forth a full, true, and particular account of all ironstone, coals, and other minerals respectively, which were in stock on the said estate on the 30th of September, 1825. Set forth a full, true, and particular account of all ironstone produced, raised, or gotten out of the said estate since the 30th of September, 1825, distinguishing the quantity gotten during each of the pays or periods between one pay-day and another pay-day; and distinguishing the kinds, natures, or sorts of such ironstone, and the quantity of each sort so gotten during each of the said pays or periods and the respective

charter prices at which the same were respectively gotten during each of the said pays or periods. Set forth a like account of all coals produced, raised, or gotten out of the said estate, since the 30th of September, 1825, distinguishing the quantity, &c., [in the same words as before.] And a like account of any other minerals which may have been produced, &c., distinguishing, &c., [in the same words as before.]

The third interrogatory contained very minute inquiries as to the quantity of ironstone which had been recovered from the Wolverhampton Colliery, distinguishing the kinds, natures, and sorts, the times when, the prices at which, and the names and addresses of the persons or firms to whom, the same had been so sold; distinguishing between the calcined and the uncalcined ironstone, &c.

The fourth interrogatory contained inquiries as to the expenses incurred and paid in respect of the Wolverhampton Colliery, other than the charter prices mentioned, and required the plaintiff to set forth a full, true, and particular account of those expenses incurred and paid during each and every of the said pays or periods; distinguishing the expenses incurred and paid, from those incurred, and distinguishing in such account the engine expenses and dead work, the general charges, with the respective items thereof, and the permanent salaries and expenses, with the respective items thereof, &c.

These and many other interrogatories were applied successively to the various mines which were the subject of the suit.

Mr. *Knight*, (with whom were Mr. *Wigram* and Mr. *Sharpe*), for the exceptions.—These interrogatories are unwarranted by the practice of the Court, and uncalled for by any of the emergencies of the cause. Where a decree gives liberty to exhibit interrogatories, a party is not warranted in interrogating as to every minute article.

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In the first instance the party is confined to the language of the inquiries directed by the decree. He must put his questions in these terms: If the answer is unsatisfactory, then upon a special case made and allowed by the judge, a more extended inquiry is permitted. It never was the practice for a party to be allowed at his own fancy to subdivide the questions as he chose, using every species of intricate variation: *Moore v. Langford (a)*. The question as to the quantity of ironstone, &c., obtained between pay-day to pay-day, is totally irrelevant. The inquiry was only as to the net profits. [The *Lord Chief Baron*.—This appears to be an attempt to obtain the particulars on which the net profits ought to be calculated. That is a legitimate object; the only question is, whether that inquiry has been carried too far.] If the Court had intended a minute inquiry in the first instance, it would have so directed. An inquiry directed as to the net profits does not give the party necessarily a right to go into all the materials from which the minute particulars may be obtained. Besides, no ground of necessity for it has been laid, nor has any state of facts been carried in. A special case ought to have been made out, supported by a state of facts.

Mr. *Wakefield*, and Mr. *Lovat*, *contrà*.—The interrogatories are consistent with the practice of the Court, and required by the exigence of the case. We deny the proposition that, in order to exhibit minute interrogatories, it is necessary to have a state of facts. If convenient to the parties, or the Master directs it, the parties may take that course, but they are not bound to do so. How could the defendant carry in a state of facts when he was ignorant what the facts were? In this case, the parties seeking to rescind the contract have been in possession eleven years,

and by the frame of the decree they are continued in possession till the account shall be taken; this shews that the object of the defendant is not delay. His object is entirely consistent with the decree, which is not merely for an account, but directs an inquiry as to waste. That distinguishes this case from *Moore v. Langford*. There, it was contended, and successfully, that where misconduct is alleged on the record, but the decree is silent upon that subject, the Master is not at liberty to allow an interrogatory on that point. Here, the Court was not content with directing an account of the net profits, but it being a case of alleged misconduct, the Court directed an inquiry as to whether the plaintiffs had been guilty of waste and negligence in the management of the concern. One of the great subjects of contest has been the "yield" account: and one question is, whether sufficient diligence has been exercised to obtain the proper quantity of yield. The yield varies from quarter to quarter, and from pay-day to pay-day. The cost of the pig iron depends on the yield. The defendant therefore has a right to know the quantity of yield. Another question is, whether the workmen have been diligent or negligent; also, whether making pig iron by contract is not more profitable than trusting to the natural diligence and intent of the workmen. The interrogatories as to the quantity of ironstone calcined, the charter prices for the coals, &c., are most essential. The accounts cannot properly be taken without entering into these minute details; and in *Bowsher v. Watkins* (a), interrogatories founded upon the decree, and in every respect as minute as those, were allowed. As trustees for the defendant, the plaintiffs are bound to render accurate accounts, and to keep those accounts in such a manner as to enable him to ascertain their accuracy.

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(a) Not reported on this point.

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Mr. *Knight*, in reply.—If the questions put are beyond the probable necessity of the case, they cannot be allowed. Where, for instance, an account is required of an executor, he is bound to set forth an accurate, and, to some extent, a minute statement; but if he sets forth an auctioneer's catalogue, it will be expunged at his own expense. *Moore v. Langford* is in point. [The *Lord Chief Baron*.—In that case the interrogatory did not grow out of the decree. That is the principle of the decision.] The common form in the Master's office for interrogating an executor is general. He is never asked for the specific enumeration of every chattel. It is not sufficient for a party to shew that by bare probability the question may be applicable. He is not spontaneously to harass his opponent; if this were allowed, there would be no end of vexation. This case will be most important to defendants, who are generally the accounting parties. If these interrogatories are allowed, what protection can they expect from the Court? In the present case no reason whatever has been given for taking the account from pay-day to pay-day. [The *Lord Chief Baron*.—You could refer to the books for that account.] It was doubted whether that mode of answering would be sufficient. In a late case a party had carried books into the Master's office, and referred to them, and the Vice-Chancellor held that was not sufficient. The main complaint against the present interrogatories is, that they call upon the plaintiffs to make calculations which are not to be found in the books. For that purpose it will be necessary to employ an accountant.

Many of the grounds on which the defendant puts this question are collateral to the present inquiry. The question of waste is totally irrelevant. [The *Lord Chief Baron*.—I agree that, generally, where an inquiry is directed to the Master, part of which is to be extracted from one side and part from another, the party who in-

sists on the negative must proceed upon a state of facts. Upon an inquiry as to waste, a state of facts would be necessary. Here, the circumstances are peculiar. You offer to account for the net profits which you have made during the time you have been in possession. It is part of your duty to do so, in order to justify you in the equity which you seek. But unless your antagonist has the means of ascertaining the manner in which you have managed the concern, how can he be satisfied with your statement of the net profits? It might have been sufficient, if no question had been raised about the proper mode of arriving at the net value of the concern, to have simply directed an inquiry as to the net profits; but part of the inquiry is, whether there has been any waste or mismanagement. Now, how can the defendant, who has not been in possession, and cannot be presumed to be acquainted with your mode of conducting business, lay a statement upon that subject before the Master? He says, "You have offered to account to me for the net profits. In order to do that, I am not only entitled to have an account of what you have made, but what you ought to have made; and therefore the question of management and skill of your servants become involved in the very inquiry of net profits." Supposing these mines to be worked by an agent, has not the principal, calling on the agent for an account of the net profits, a right to make those inquiries?] It is apprehended he has not that right without making a special statement. The defendant has made no suggestion against the fulness, fairness, and regularity of the plaintiffs' books. He ought, in the first instance, to have called on the plaintiffs to verify their books. As to the question of management, it has nothing whatever to do with the accounts.

The LORD CHIEF BARON.—This is a case of exceptions to the certificate of the Master, in which he has

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allowed certain interrogatories to be put in. The ground of the exceptions are, that the interrogatories are too minute, and may therefore operate in a way to give great delay, and render it impossible for the Master to go through the inquiry which he is directed to make, in a satisfactory manner. [His Lordship then read that part of the decree which is above stated.]

Now the Master has here a very laborious inquiry cast upon him, and one that of necessity calls upon him to enter into very minute details. It is alleged by way of objection to the interrogatories which he has allowed, that there has been no statement of facts preceding them, in order to inform the adverse party what is the allegation which the party intends to make or to maintain before the Master. Now it appears to me that this case, so far as it depends upon ascertaining the net profits, and the manner in which the work has been carried on, with some of the other particulars stated in this reference to the Master, does not require, and does not in its nature admit of, a statement of facts. How can the defendant make any statement of facts respecting the net profits, or respecting the improper mode of carrying on the trade upon these premises, to which he had no access? It appears to me that, so far as the Master is called upon to inquire into the net profits, or the mode of carrying on the trade, or the capital expended, or properly expended, it is not a case in which the defendant can be called upon to make a statement of facts, if such a statement were essential. That part of the inquiry which respects the permanent damage done to the premises in the shape of waste or injury existing after the premises were delivered up, may undoubtedly be made the subject of a statement of facts. But still I do not understand the inquiry here directed to that particular part of the case, or that the objection arises from any want of statement of facts upon that subject. The use, I apprehend, of a statement of

facts before the Master by either party, is merely to assist the Master in his inquiry. The usual course of the Master's office is, that the parties should assist him by statements of what they want to prove, or wish to have admitted, but I do not apprehend that the party is essentially called upon to do that for the purpose of constituting the inquiry. Suppose the Master himself were left to suggest what course he would take to ascertain the particulars inquired after; what else could he do but call upon the parties to render an account of all the particulars necessary to enable him to calculate the net profits, or to ascertain the mode in which the work was carried on? I cannot, therefore, myself, see any objection to this certificate of the Master.

The apprehension which might have been felt, that it might be impossible to make an answer to these inquiries, could only be, that the account had not been kept in such a manner as to enable the parties to give the minute answers required. Now, assuming that to be the fact, it appears to me the Master ought to be satisfied with an answer which shall shew him that the parties *bonâ fide* render such an account as circumstances enable them to render, there being no intention to hold back what ought to be communicated. Let me put a case only to illustrate what I mean. The interrogatories require that the particulars shall be stated of the materials raised from the collieries and mines, and various other matters, upon every pay-day, so as to take an account from pay-day to pay-day. I will suppose that in the progress of the work—I know nothing of it, I will assume it,—the habit has been to take a precise account from pay-day to pay-day, in order to ascertain and to check the quantity in hand, with the quantity that ought to be in hand, but that after the parties are satisfied that all is correct, it has not been the practice to enter the minute particulars of pay-day and pay-day in the books; but the parties being

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satisfied with the checks taken at the time, have thrown the memorandums or vouchers away, and have only entered the result in the books, either monthly, quarterly, or half-yearly—on that answer being *bond fide* made to the Master, and it appearing, on reference to the books, that such was the case, the party would naturally say, we are not unwilling to render the minute account you require, but in fact our mode of keeping the account has not permitted it; we have kept them in such and such a manner, and we will render you as faithful and minute and particular account as we can, consistently with the mode in which we have kept the account; but as we have not preserved those vouchers from fortnight to fortnight, we can make you no other answer: and it appears to me the Master ought to be satisfied with that answer. But suppose on the other hand it has been thought necessary for the purpose of carrying on the trade to keep the accounts in that way, and that those accounts do not exist; then the proper answer would be, that the books have been brought into the Master's office, and will be verified on oath, as books kept in a certain manner; and by reference to certain pages of the book, the Master will find the particulars which are there stated, the result of which may be given in the answer. It appears to me, therefore, that no difficulty lies in the way. That an account of this nature may take some time and great attention to investigate it, is undoubtedly true; but I do not see, notwithstanding the minute particulars to which these interrogatories are directed, that they really go to any thing more than that which may—I do not say absolutely must—be essential, or at least highly useful, to ascertain the precise data upon which the calculation is to be made. For example, it is suggested that, from a given quantity of matter, composed of various sorts of minerals or coals—I do not pretend to know any thing of the details—you ought to extract a certain quantity of net iron. If so, how can the Master ascertain whether

the trade has been properly or improperly carried on, without the means of ascertaining the amount of the raw material as compared with the result of net produce? These interrogatories are calculated to ascertain that. If the Master, upon examining the mode in which the account has been really and *bonâ fide* kept—assuming the account to have been kept *bonâ fide*—should find the mode of keeping it does not permit the party at this distance of time to go so minutely into particulars, but yet appears to have been kept with prudence, and in a manner not to deceive the party himself, he will be satisfied with the answer on that subject. He will be satisfied if the party says, we cannot give you the minute quantity of each material raised in each fortnight, but we can give you a very sufficient account of what was raised quarterly, and what was raised half-yearly, and we say we examined the checks from time to time, and we have no reason to believe that there is any defalcation, any subtraction or abuse of confidence reposed in our workmen during the period; therefore we have not had a minute account, but such as it is we give it to you. The interrogatories do not bind the parties to answer that which they do not know; and if there has been no suppression, no fraud, no neglect, so as to render any further inquiry necessary, in my opinion the Master ought to be satisfied, and will be satisfied with the answer so given.

It appears to me, therefore, that there is no good reason for allowing the exceptions made to the Master's certificate. I think it must have been perceived when the case was argued, that that was the inclination of my opinion. If I could see that, for the purpose of any delay, interrogatories were put in so minute a form as were wholly unnecessary, it would have been my duty undoubtedly to resist any expedient that either side might adopt for such a purpose. But I entertain no suspicion of that sort. I can see no reason, no interest, that either party should now have for delay in this case.

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Before I gave my judgment, I thought it right to communicate the particulars to my predecessor, who is much better acquainted with the whole history of this case than I can pretend to be, or I hope ever to be; and he stated that, upon his view of the case, he did not think the interrogatories were improper. He seemed to take the same view I did of it, and said he thought he would confirm the Master's certificate. Under these circumstances, it is a great satisfaction to have his authority for saying that the course I have taken is that which he would himself have adopted.

Exceptions overruled.

May 5th.

POTTER v. HYATT.

A clerk in court has a lien upon the fund in Court, and also upon the decree and other documents in the cause, in respect of his fees and disbursements.

UNDER an order made in this suit, which was instituted in the year 1831, a sum of money was paid into Court, and invested in the purchase of 694*l.* 3*l.* per cent consols., in the name of the Accountant-General, in trust to the credit of this cause. Various proceedings were afterwards had until the year 1835, when the plaintiff changed his solicitor. Upon that occasion the bill of costs of the former solicitor was paid, which bill included the usual items of fees and payments to the plaintiff's clerk in court, amounting in the present instance to about 24*l.*

Shortly after this transaction, the plaintiff, through the medium of his new solicitor, entered into a compromise of the suit with such of the defendants as were mainly interested, in consequence of which a motion was now made for the plaintiff, that the sum of 694*l.* 3*l.* per cent consols., might be paid out of Court, and apportioned between him and those defendants; and that, thereupon, the bill might stand dismissed. The plaintiff's clerk in court had not,

in fact, been paid, although the plaintiff's former solicitor had received the money in the manner before stated.

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Mr. Campbell, for the plaintiff, in support of the motion.

Mr. G. L. Russell for the defendants.

Mr. Simpkinson, for the plaintiff's clerk in court, opposed the motion on the ground that the money due to his client for fees and disbursements had not been paid. The fund in question has been paid into Court, in consequence of the exertions of this gentleman; and it is extraordinary if the Court cannot order its own officer to be paid his fees and expenses out of it. A clerk in court has a lien on the funds in Court, and has altogether the same privileges in the cause as a solicitor. He is, in fact, the only recognised attorney in the cause; and the circumstance, that the costs have been paid to a former solicitor, ought not in any way to affect him. There are several cases, both in Chancery and in the Exchequer, bearing upon this point: *Taylor v. Lewis* (a), *Merrywether v. Mellish* (b), *Stevens v. Avery* (c), *Donnelly v. Lawley* (d), *Delay v. Popham* (e), *Shafto v. Powell* (f). There are also many cases in point in the minute books.

Mr. Campbell, in reply.—The case of *Taylor v. Lewis* has no application to the present, for that was a question between a six clerk and a clerk in court. The motion stood over in order to ascertain a fact, and the matter was afterwards compromised. In the case in *Dickens*, a sum was actually due from the client to the solicitor. Here, the present solicitor has paid the whole bill to the former solicitor. The cases cited from *Fowler* are of little or no

(a) 3 Atk. 727.

(b) 13 Ves. 161.

(c) 1 Dick. 224.

(d) 2 Fowler, 381.

(e) Id. 382.

(f) Ibid.

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authority. Fowler was himself a clerk in court, and, therefore, scarcely a fair judge of the question. The cases, however, which he mentions, do not bear out his proposition, which is that a clerk in court has always a lien for his fees upon the money in Court. In one case, he mentions the taxation of Mr. Martin's bill of costs. That shews that Mr. Martin was acting not only as clerk in court, but as the solicitor conducting the cause; because the fees due to him as clerk in court would not be subject to taxation. The same observation applies to the other cases. The clerk in court is the agent of the solicitor; he is not retained by the client: there is no privity between him and the client. He has a right of action at law and suit in equity against the solicitor for the amount of his fees: *Barker v. Dacie* (a). If that be so, it follows that he has no demand against the client, and can have no lien as against the client. If there were a lien, it could only be through the medium of the solicitor; but, by payment to the solicitor, that lien would be discharged. [The *Lord Chief Baron*.—Can you show that any one can conduct a suit without the clerk in court? He is the recognised officer of the Court.] In *Farewell v. Coker* (b), it was held that the clerk in court was not entitled to his fees, after the client had once paid them to the solicitor. That case is not distinguishable from the present. [The *Lord Chief Baron*.—In that case there was no money in Court.]

The LORD CHIEF BARON.—How is it at law, where the attorney for the plaintiff or defendant is his agent for conducting the action; can the Court take notice of any other attorney than that attorney whose name appears on the record? I apprehend not. Then, as the Court of Chancery is not a Court of record, whom can that Court recognise

(a) 6 Ves. 631.

(b) 2 P. W. 460.

as the solicitor, and as the party acting in the conduct of the suit, but the clerk in court? The office of sixty clerk in the Court of Chancery, and of clerk in court in the Court of Exchequer, originally had this meaning, that in Courts of equity no person could employ any one to prosecute his suit, except one of the officers of those Courts. So it was upon the other side of this Court till the Court was opened. The clerks in court, and the side clerks, were the only persons the Court could notice; they could not recognise the name of any attorney, either of the plaintiff or the defendant, unless he were one of their own officers. The rule has since been relaxed. The Courts now permit suits to be conducted by professional men who are not their officers; but it is not to be considered, that because the party employs a solicitor as his agent, he is exclusively an agent in every sense of the word. The solicitor is the medium of communication between the client and the clerk in court. The question then is, who has the lien on the decrees and papers and funds in Court, in the progress of a cause? It appears to me, that the clerk in court, as the officer of the clerk, is the person so entitled. As, originally, no person had the power of conducting the cause but the clerk in court, I think, that for the present purpose, he is the only solicitor the Court can look to.

If a strong case could be cited to shew that this was not so, I should be glad to look into it. The case cited from *Peere Williams* does not shake the principle upon which it seems to me that the right of the clerk in court depends. In that case there was no question as to any lien upon money in Court. The question was, whether the Court could make an order upon a party, who had no money in Court, to pay the particular bill. The Court thought it could not do that. So, if the money had been paid here from one party to the other, the Court could make no order. All the Court can do is to give effect to

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any lien that may exist in any of its officers. An attorney has a lien at law upon the judgment of the Court of law. When judgment is given on behalf of a party who has employed a second attorney, the Court will not permit the new attorney to issue execution on the judgment without seeing that the first attorney's costs are paid; because he had a lien upon that judgment. Now, what is the nature of the present motion? It is, in substance, an application by the new solicitor of the plaintiff, without the leave of the clerk in court, to have money paid out of Court, on which a lien exists. Upon the principle, therefore, which I have already stated, it seems to me that this application cannot be granted. I am very sorry for the party who suffers in this instance, but he should have made enquiries on the subject, and taken steps to see that the money was paid. If the bill had been taxed, the solicitor must have shewn that he had paid the clerk in court, or that the latter had given him credit for the amount of his expenses.

Upon the whole, it appears to me that the solicitor who has the lien on a judgment or a decree of the Court, is in the first instance the clerk in court; and, that on that principle, these expenses must be paid. It strikes me so at present. The plaintiff, therefore, must take his order, subject to the clerk in court's demand. If I see any reason to change my opinion, I will mention the matter again.

On a subsequent day his Lordship said that he adhered to his former opinion.

11th Dec. note. 47a C. Ex. 540

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May 30th,
31st.

WRAGG v. DENHAM and Others.

52. 117
IN the year 1828 the plaintiff contracted with the defendant Denham for the purchase of two third parts of a freehold messuage and lands situate at Handley, in Derbyshire, for 350*l.*; and shortly afterwards contracted with some persons of the name of Hawksley for the purchase of the remaining third part. The plaintiff not being able to pay the 350*l.* to Denham, it was arranged that the whole of the property should be mortgaged to Denham to secure the repayment of that sum with interest. This arrangement was duly carried into effect by deeds bearing date in June, 1828. Those deeds were prepared by the defendant, Thomas Clarke, who acted as the solicitor for both parties.

In the same month of June, 1828, the plaintiff being seised of some freehold and copyhold property situate at Woodhead, in the county of Derby, by indentures bearing date the 16th and 17th of that month, reciting that there was due to one Boot, on the security of those premises, 140*l.*, and that the defendants, Thomas and John Clarke, had agreed to pay off the same, and also to advance to the plaintiff 200*l.* more, it was witnessed, that in consideration of 140*l.* paid by the Clarkes to Boot, and of 200*l.* paid by them to the plaintiff, the latter covenanted to surrender the copyholds, and released and conveyed the freeholds to the defendants Thomas and John Clarke and their heirs, in trust to sell the premises, and out of the proceeds of the sale to reimburse themselves their costs and expenses; then to repay themselves the 340*l.* with interest; then to repay Denham his 350*l.* with interest, and to pay the surplus, if any, to the plaintiff.

In 1830 the interest on these mortgages being greatly in arrear, the defendants turned the plaintiff and his

On a bill for redemption of mortgaged property in the possession of the mortgagee, the latter will be made to account for all loss and damage occasioned by his gross negligence in respect of bad cultivation and non-repair of the mortgaged premises.

Where an attorney had taken a mortgage from his client for his bill of costs in preparing that and another mortgage, and the client, before the attorney's mortgage was executed, assented to the bill, but afterwards, on coming to redeem, questioned its accuracy, the Court directed the Master to examine the bill with a view to ascertain the reasonableness of the charges, without entering into evidence as to whether the business charged for had been actually done.

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family out of the premises, sold the crops, and took and retained possession of the property. The Woodhead property was advertised for sale, but no sale was effected.

The plaintiff now brought his bill to redeem both mortgages, charging that the defendants had been guilty of gross negligence in the management of the property while in their possession, and ought to be made answerable for the damage done through their neglect; charging also that the money stated to have been advanced by the defendant Clarke was the alleged amount of his bill of costs, but was in fact not justly due to him from the plaintiff, and that in fact no bill of costs had ever been delivered; praying accounts of the rents and profits of all the premises, that the defendants might be chargeable for damage done from non-repairs, and that Clarke's bill might be taxed, &c.

The defendants by their answers admitted that the premises were out of repair, but ascribed it to the conduct of the plaintiff and an attorney whom he had lately employed, who, as they alleged, had done various acts to stop the sale of the property, and had thereby prevented respectable tenants from hiring it. The charge in the bill respecting the mortgage made to the Clarkes was explained thus: that 140*l.* was advanced by them to pay off Boot's mortgage; 126*l.* 17*s.* to pay the Hawksleys for their one third of the Handley premises; and 78*l.* 16*s.* 5*d.* for Thomas Clarke's bill of costs. The defendant Clarke also insisted that before the plaintiff executed the mortgage deeds of the 16th and 17th June, 1828, he carefully inspected the bill of costs, and made no objection to any item therein; but the defendant did not recollect whether he had delivered to the plaintiff a copy of his bill of costs.

The cause coming on for hearing, the plaintiff gave evidence of bad husbandry and want of repairs on the premises since August, 1830, when the defendants took possession. In reference to the Handley property, one

witness swore that a field of about three acres and a half was fallowed in the summer of 1831, and laid down on such fallow, and that three crops following the fallow had since been sold therefrom; and that the fourth crop was a hay crop, which was then growing thereon; and that the greater part of the remainder of the farm which should have been fallowed had not been so, but had been hardly cropped, without an adequate quantity of manure laid yearly thereon. It was also proved that the barns and out-buildings on the freehold premises were in a tenantable state of repair in 1830; but since that time they had become very ruinous for want of necessary repairs, the wet being allowed to get in. In the judgment of the witnesses, the Handley property was in August, 1830, worth 16*l.* per annum, but now not above 9*l.* per annum. The Woodhead property was not so much depreciated.

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Mr. *Spence*, and Mr. *Hall*, for the plaintiff, submitted that special directions ought to be given respecting the deterioration of the property, and that Clarke's bill of costs ought to be taxed, 78*l.* being an exorbitant charge. Besides, it did not appear that any bill was properly delivered. [*Alderson*, B.—No doubt the bill ought to be looked at by the Master. The attorney prepared the mortgage in his own favour, and part of the consideration money is paid over to his own client.]

Mr. *Twiss*, and Mr. *Hayter*, for the defendants, Denham and Clarke.—No enquiry as to specific mismanagement ought to be allowed. If specific waste had been committed on the premises, as, for instance, by pulling down a house and selling the materials, such an enquiry would have been essential, but that does not apply to mere depreciation arising from bad husbandry. [*Alderson*, B.—In *Hughes v. Williams* (a), Lord *Eldon* says,

(a) 12 Ves. 495.

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that "if the mortgagee can be shewn to be guilty of such gross negligence as comes up to the description of wilful default, he ought to be answerable for it." The question is, whether there has not been here such gross negligence as to occasion depreciation; not merely whether there has been mishusbandry. What is alleged by the witness as to the manner of cropping the land, appears to be gross misconduct in the mortgagees.] The question is not between landlord and tenant, but between mortgagor and mortgagee. The tenant is under a contract with his landlord for the proper management of his farm, but the mortgagee is in no such situation. If, failing to obtain his principal and interest, he gets possession of the premises, he ought not to be responsible for any thing beyond fraud. As to the bill of costs, it is clear, that unless it contains a taxable item, it ought not to be submitted to the Master for taxation. [*Alderson, B.*—It is in the nature of a bill of costs which has been paid; and I think the Master ought to look at it.] If it is submitted to him with a view to surcharge and falsification, the plaintiff ought to point out the particular items which he objects to.

Mr. Shadwell, for another defendant.

Mr. Spence, in reply, contended that it could not be consistent with the duty of a mortgagee in possession, so to manage the property, that when the mortgagor came to redeem, it was not worth half its value. He cited *Russell v. Smithies* (a) as shewing the principle on which cases of this nature rest, although there, under the circumstances, the decision was in favour of the mortgagee.

ALDERSON B.—There is no dispute that the account will be taken, generally, in the ordinary manner. The decree will direct the Master to take an account of the

(a) 1 Anst. 96.

principal money and interest due to the mortgagees, to charge them with the rents and profits received by them since they took possession, and to take an account of the crops sold by them since that period; and upon making all due allowances, the Master will and ought to deduct from the monies found to have been received from the sales the expenses of the sales, and all necessary expenses which the mortgagees incurred to obtain a transfer from the purchasers of the crops of the monies due upon such sales.

The next question is, whether I ought to direct the Master to enquire into the amount of the bill which formed part of the consideration for the mortgage executed by Wragg to his attorney. I think I ought; because, it appears to me that Clarke and Wragg being in the situation of attorney and client at the time these transactions took place, Wragg's assent to the bill of costs was not such an assent as ought to preclude him from an enquiry upon the subject before the Master. At the same time it would be unreasonable to require Clarke now to enter into evidence of business done for his client; and the only question will be, whether, if the business were done, the charges are fair and reasonable. If the Master thinks that they are not so, he must make a deduction in that respect.

Then comes the important question, whether I ought to charge the defendants with the deterioration in the value of the premises since the period when Clarke took possession. It is clear that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature decaying by time, which was the case in *Anstruther*. There, the mortgagee was in possession of the premises for forty years; and during so long a time the decay would naturally take place, even supposing the premises to be repaired in the mean time in the ordinary way. I think, also, that a mortgagee ought not to be charged exactly

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with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of shewing fraud in the mortgagee: gross negligence is sufficient. The question therefore is, whether the fact of gross negligence is sufficiently established in this case to enable me to direct the enquiry asked for by the plaintiff. Upon that point I should like to look more minutely into the evidence, because if the Master be directed to make that enquiry, there will be considerable additional expense. If upon examination of the evidence I should come to the conclusion that a *prima facie* case of gross negligence is made out, I must direct the enquiry. If, on the other hand, I should be of opinion that there is not sufficient evidence of that fact, of course the principle of law will not apply.

On the following day his Lordship said that he had looked through the evidence, and upon the whole he thought he ought to direct an enquiry as to whether the deterioration in the value of the premises had arisen from the gross negligence in the mortgagees for want of proper repairs and proper cultivation. As to the other point, respecting the bill of costs, his Lordship thought that the Master ought to look at the bill with a view to consider the propriety of the items, upon the assumption that the business had been actually done.

Decree accordingly.

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EDWARDS v. EDWARDS.

May 25th.

FARMER EDWARDS, deceased, holding certain copyhold lands for lives, under the Dean and Chapter of Winchester, as lords of the manor of Honiton, in the county of Wilts, agreed to surrender the same, for the purpose of substituting two new lives for two of the original lives. The proposed lives were those of John and James Edwards, who were his great nephews. Farmer Edwards having paid part of the consideration money, died; and the agreement was carried into execution by James Edwards, his brother and personal representative, who paid the residue of the consideration money. James Edwards died, and under his will the present plaintiff, Edward Edwards, claimed the property, and took possession of part of it. John Edwards took possession of the other part; and also brought an action of ejectment to recover the part which was in the possession of Edward, alleging an intention in Farmer Edwards to provide for his great nephews; and also alleging a custom in the manor, that after the death of the tenant in possession of an estate holden of the manor for lives, the next life in reversion for which the estate is holden shall be entitled to enjoy the estate.

Quære, whether it is a good and reasonable custom that upon the death of a tenant in possession of lands holden of a manor for lives, the next life in reversion for which the estate is holden shall be entitled to enjoy the estate; and if such custom be good and reasonable, whether, where a party takes a grant of such lands for the life of himself and his grand nephews and dies, the grant shall operate as an advancement for the grand nephews, so as to rebut a resulting trust in favour of other parties claiming under the purchaser.

The present bill was filed to restrain the action, and the plaintiff had obtained the common injunction.

Mr. Spence, for the defendant, now moved to dissolve the injunction, the defendant having put in his answer. He also submitted, that as the custom under which the defendant claimed could not be disputed, the Court would give him the immediate benefit of a judgment, so as to enable him to establish his legal title for the purposes of this suit, without the expense of prosecuting the action.

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The legal title of the defendant was recognised in *Edwards v. Fidel* (a). This is purely a question of equity; namely, whether the defendant can rebut the resulting trust of which the plaintiff claims to have the benefit. It is conceded that the onus of rebutting that resulting trust rests upon the defendant.

Mr. *Tenant, contrà*.—The defendant has no equity, for he admits that he never paid a farthing for the property, and no legal title, because the custom set up is unreasonable and bad. The case of *Edwards v. Fidel* is overruled by *Lewis v. Lane* (b).

Mr. *Spence*, in reply.—*Edwards v. Fidel* was only cited as recognising the legal title of the defendant. The opinion there given as to the validity of a custom which excludes resulting trusts, is not relied upon here; for it is admitted that the defendant must rebut the resulting trust. *Taylor v. Alston* (c) will probably govern the present case. [The *Lord Chief Baron*.—The customs in Wiltshire are peculiar. That which you state is a curious one, for it precludes the common law right of holding in joint-tenancy.]

THE LORD CHIEF BARON.—I cannot, under present circumstances, consent to allow the defendant the benefit of the judgment; but, as the title at law is disputed, I see no reason why I should preclude him from going to trial. Therefore, the injunction must be dissolved as to that; but let there be an injunction to stay execution till the question in equity is settled.

(a) 3 Madd. 237.

(b) 2 M. & K. 449.

(c) 2 Cox, 96, cited.

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Lord GLENGALL v. EDWARDS.

May 7th.

THIS was a bill of discovery, in aid of a defence to an action brought against the plaintiff on two bills of exchange, which had been given by the plaintiff to the defendant's father.

The father died in March, 1832, and the defendant took out letters of administration of his father's effects, and possessed himself of the books and papers of the deceased. The defendant, however, by his former answer to the bill, alleged that he had not come into the possession of these bills of exchange as his father's administrator, but had received them from his father for valuable consideration. He admitted, however, that he had assisted his father in his business, and knew the state of his affairs.

Upon a bill of discovery in aid of a defence to an action on a bill of exchange, if the defendant in equity is interrogated as to the consideration given for the bill, he must answer not only as to the consideration which he gave for the bill himself, but as to that which he knows another party to have given.

The case made by the bill was, that from 1821 to 1828 the plaintiff had employed the defendant's father as his tailor, and that he had frequently paid him by means of bills, drawn by the plaintiff on his agent, but that the plaintiff had never had any dealings with the defendant's father except as his tailor, and that all accounts between them had been long since settled and paid.

The plaintiff having amended his bill by interrogating the defendant more closely as to the consideration for which these bills were given, exceptions were taken to the answer for insufficiency.

Per Curiam.—In an action brought against Lord Glengall on these bills, he must shew, first, that the bills were without consideration in the hands of the deceased, and, secondly, that they were without consideration in the hands of the plaintiff at law. It was long doubtful whether a defendant might not throw the onus of prov-

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ing consideration on the plaintiff, by shewing that it was an accommodation bill; but it has lately been held that you cannot do that. In this case, if the defendant had answered—I hold the bill *proprio jure*, and know nothing about my father's affairs—that would have been a complete answer; but the defendant goes farther than that. He answers in such a manner as to shew that he can rely on both points at law: he is, therefore, bound to give the plaintiff an explicit answer on both points. It is clear that when a bill of discovery is filed against a person who brings his action on a bill of exchange, and the plaintiff in equity puts questions as to the consideration, the defendant in equity is bound to state, not only the consideration which he gave for the bill himself, but that which he knows another to have given.

The Court was then about to allow the exception; but it appearing upon an examination of other parts of the defendant's answer, that he had stated upon the whole what was sufficient to meet the plaintiff's ends,

The exception was overruled.

Mr. *Simpkinson*, and Mr. *E. Montague*, for the plaintiff.

Mr. *Temple*, and Mr. *Kenyon Parker*, for the defendant.

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May 14th.

TH E bill in this case was filed by the plaintiff, on behalf of the underwriters at Lloyd's, against the defendant Solarte, and two other persons of the names of Sante-marie and Santos, for discovery, and for a commission to examine witnesses abroad in aid of the defence to an action brought against the plaintiff by Solarte on two policies of insurance. The policies were effected on certain goods and doubloons, alleged to have been shipped at Bordeaux, on board a vessel which sailed from that place on the 4th of September, 1829, and was lost on the 15th of the same month. The interest was averred to be in the defendants Santemarie and Santos, who at the time of the alleged shipment were merchants and partners, resident at Bordeaux.

The bill was filed in February, 1830. In April, 1836, the defendant Santos put in a very full answer, in which he stated, that in consequence of the loss of the property insured, and other severe losses, he and his partner were obliged, in February, '1830, to borrow a large sum of money in order to continue their payments; and that, as a security for the sum borrowed, they assigned the policies in question to the lenders of the money. He further stated, that he and his partner afterwards stopped payment; that in March, 1831, their failure was declared by the Tribunal de Commerce at Bourdeaux, and that syndics or assignees of the estate and effects of the partnership were duly appointed by that Court: that considerable discussion took place in the French courts as to what was to be considered the precise legal time of the failure, and that it was ultimately decided by the proper court of appeal, that the failure took place on the 20th of April, 1830. The defendant then stated, that owing to these proceed-

Upon a bill of discovery in aid of a defence at law, and an injunction to restrain the proceedings at law, the Court will not dissolve the injunction before the coming in of a defendant's answer, upon presumptive evidence of his death, if that evidence, though strong, be qualified by circumstances tending to a contrary conclusion.

Answer read as an affidavit of a fact, and affidavit admitted to contradict the answer upon that fact.

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ings, and other circumstances which he mentioned, he had been unable to put in his answer at an earlier period.

The plaintiff having obtained the common injunction, a motion was now made to dissolve it as against the defendant Santemarie, who had not answered, but who was not to be found. In support of the motion, the following statement was read from the answer of the defendant Santos:—That Santemarie left Bordeaux for London in November, 1829, for the purpose of settling with the underwriters, at which time he was in a very bad and infirm state of health, and was of a consumptive habit, and afflicted with spitting of blood, for which complaint a cold climate, such as England in the winter season, is particularly unfavourable. That the defendant was informed that, shortly after Santemarie arrived in London, he found his complaint so much increased by the nature of the climate, that he was under the necessity of quitting England. That he went from thence to Nice, and from Nice to Genoa, where the defendant received a letter from him in March, 1830. That since that time the defendant had received no letter from him, but was informed during the last year by Mr. Doris, a broker at Bordeaux, that Santemarie had gone from Italy to Rio Janeiro, and had died there; but by what means Mr. Doris obtained such information, and whether the same was true or not, the defendant could not set forth. That from the circumstances before mentioned, and from no communications ever having been since received from him, either by the defendant or any other person at Bordeaux, the defendant was fully persuaded, and had no doubt, that Santemarie had long since died, it having been the opinion of the defendant and other friends of Santemarie's, at the time he quitted Bordeaux for England, that he would not recover from his disease; and that it would in no very long time occasion his death.

In answer to this statement, the affidavit of Mr. Wil-

liams, the agent of the plaintiff's solicitor, was read. The deponent stated some slight circumstances, tending to shew that Santemarie had not gone to Genoa. He however added, that he had in his possession letters, in the handwriting of Santemarie, and which had been sent to his correspondents at Paris, bearing the date and postmark of Geneva, and dated at several times in 1830. The last date was that of the 4th September, 1830. According also to the deponent's information and belief, Santemarie had at the time of making this deposition several children and relations living near Perpignan and at Barcelona; and in January, 1830, when the deponent was at Bordeaux, a nephew of Santemarie, who attended at the counting-house of the firm at that place, corresponded with his uncle at Geneva.

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Mr. *Simpkinson*, Mr. *Sidebottom*, and Mr. *Heathfield*, for the motion.—There are many cases where, though it be known that a defendant is alive, the Court will dissolve the common injunction before the coming in of his answer. The cases on that subject are collected in *Bowles v. Orr* (a). Those of *Montague v. Hill* (b), and *Vandam v. Munro* (c), are likewise in point. But here, we contend that the defendant Santemarie is dead. There is every evidence of that fact, short of a burial certificate, and Mr. Williams's affidavit does not contradict the answer in any material point. Besides, supposing him to be alive, he has assigned his interest, or at all events, his interest ceased on the bankruptcy. [The Lord Chief Baron.—It does not signify in whom the interest is vested. The plaintiffs in equity have a right to discovery, and the only question is, whether Santemarie can make a discovery.] Santemarie having assigned his interest, his answer could not be read on the trial of this action: *Imperial Gas*

(a) 1 Y. & C. 474.

(b) 4 Russ. 128.

(c) 2 Anat. 502.

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Company v. Clarke (a). [The Lord Chief Baron.—According to that argument, if any one of the defendants in equity assigns his interest, you can only go against the others.]

Mr. *G. Richards*, and Mr. *J. Russell*, contra.—The only question is, whether *Santemarie* is dead. If he is dead, it will be difficult to say, even then, how the injunction is to be dissolved—if he is alive, the underwriters are entitled to his answer. It has been argued, that the answer of *Santemarie* could not be used in the King's Bench, although he assigned his interest subsequently to the action. If that be so, parties have only to make a fraudulent shipment, and then to assign their pretended interest. In some of the cases, an assignment has been made for a valuable consideration before the proceedings commenced. That was the ground of Lord *Lyndhurst's* decision in the case of the *Imperial Gas Company*, but no ground of that nature exists here. The answer of *Santemarie* is required for the purpose of clearing up several points upon which *Santos* is silent. As to the allegation of his death, it is singular that his partner should be unable to make a more explicit statement on that subject. In some cases injunctions have been dissolved on the coming in of the answer of one defendant; but those cases are not applicable here, and *Bowles v. Orr* is in favour of the plaintiff. Such a motion as the present must be founded on very special grounds: *White v. Steinwacks (b)*.

Mr. *Simpkinson*, in reply.

THE LORD CHIEF BARON.—I think it is conceded by the counsel for the defendants, that this application is founded on what is said to be a ground of exception to a general

(a) 1 Younge, 580.

(b) 19 Ves. 84.

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rule. Where a party is dead, I admit that must be taken to be a good ground of exception. Other circumstances also may lead to the same result; but each case must depend on its own peculiar circumstances. Now, what is the evidence here to satisfy me of the death of this defendant? If it depended entirely on the answer of the defendant Santos, I should say it was reasonable evidence of his death. It is even consistent with the affidavit to a certain extent, for the party who makes the affidavit does not swear to any belief that Santemarie is alive. True; but the affidavit qualifies the facts from which the defendant Santos draws the inference of his death. On the one hand it is said, that Santemarie was in ill health and obliged to go to London; that he went from thence to Genoa, from which place the defendant heard from him for the last time, in March, 1830; and that the defendant afterwards heard from his brokers, that he had gone to Rio Janeiro, and died there. I should say that these were reasonable grounds for presuming that he was dead. But on the other side the evidence is qualified thus. It appears that this gentleman came to England to expedite the proceedings in this cause, and that he afterwards quitted England, and went to Genoa; and he might have been at Genoa in March. From the answer, you would suppose that he had never been heard of by his correspondents at Paris since that period, but he was heard of at Geneva so late as September. Besides, he had relations, of whom an inquiry upon the subject might have been made.

Now it is admitted, as to the case itself, that Santemarie was a person who had information to give. I do not say whether it was material or not. It is sufficient, I think, under present circumstances, to shew that information might have been obtained from him. My opinion therefore is, that the motion must be refused. I will not say whether there is not sufficient strength in the facts stated

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by the defendant to support the presumption on which he relies, if those facts stood alone; but being explained, and something being thrown into the case, from which it appears that Santos might have known with more certainty the fact of this gentleman's death, I must say that I think a jury, weighing the evidence on both sides, would scarcely come to the conclusion insisted upon by the defendant. It appears therefore to me that I ought not, upon such facts, to be so satisfied of the death of this party as to refuse the discovery which the plaintiff seeks.

I ought to mention that, as the bill was filed in February 1830, and Santemarie was at Geneva in September of that year, and the bankruptcy did not take place till 1831, I do not see why the defendants should not have put in their answer, before the Tribunal de Commerce at Bordeaux interfered to make them bankrupts.

Motion refused.

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Jan. 13th.

Policies of insurance having been effected by a certain firm on goods alleged to have been purchased and shipped by them in September, 1829, and an action having been brought on those policies, the underwriters filed a bill of discovery against the firm, alleging that no such purchase had been made; and afterwards

The object of this suit being to ascertain the truth of the alleged purchase and shipment by the defendants Santemarie and Santos, the original bill contained charges to the effect, that the whole case made in support of the action at law was false; that no such property as that comprised in the policies had in fact been purchased or shipped by those defendants; that the goods which they pretended to have purchased amounted in value to more than 175,000 francs, and that a large portion of them were alleged to have been paid for by bills drawn and accepted by the defendants at very long dates, whereas in fact the defendants, in August and September, 1829, were in very bad credit, and could not

obtained an order to amend their bill, upon a suggestion, supported by affidavit, that the firm had not sufficient capital to make the purchase:—*Held*, that such permission to amend did not authorise the underwriters to introduce into their bill inquiries as to the general solvency of the firm, or as to its dealings and transactions from the commencement of the partnership in 1827.

The underwriter has a right to the most extensive discovery relative to the particular transaction which is impeached, but the Court will interpose to prevent him from making general inquisitorial inquiries.

have procured credit for 10,000 francs on their bills. The bill also charged, that by the papers which they had delivered to the company it appeared that they had not purchased doubloons to the value mentioned in the second policy. The bill then contained many minute inquiries as to the time and manner in which the alleged purchases were made, and the names of the several vendors and consignees.

According to the answer of the defendant Santos, which purported to be a full explanation of the several matters inquired after by the bill, the goods comprised in the first policy were paid for by cash, and in every other possible manner; but the doubloons were, for the most part, purchased by giving credit in account to the vendor, and by means of accommodation bills.

The plaintiff, conceiving that the circumstances disclosed by the answer, and other circumstances within his knowledge, afforded the means of further discovery, moved for and obtained an order, in July, 1836, that he might be at liberty to amend his bill without prejudice to the injunction. The motion was supported by the affidavits of the plaintiff's agents, Mr. La Vie and Mr. Williams, stating further circumstances with a view to shew that this was not a *bond fide* purchase; suggesting also, that such circumstances might be proved by an inspection of the defendants' books, and of the correspondence between them and the parties to whom the doubloons were alleged to have been consigned. Amongst other things, the deponents stated their belief that the partnership of Santemarie and Santos was not possessed of sufficient capital to make the alleged purchase.

The order of July, 1836, was qualified by a direction that the amendments should be made within a month, and that they should be confined to matters suggested by the affidavits of La Vie and Williams, and such matters as might arise from the inspection of the books.

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The plaintiff amended his bill, introducing into it a variety of new charges, to the effect that Santemarie and Santos entered into co-partnership in 1827, and that from the books of the partnership it would appear that they were insolvent, and incapable of making the pretended shipment. That they had numerous books, consisting of rough-books, cash-books, books for bills payable, for bills receivable, &c., and that they ought to set forth a full list and statement of all such books, and of all books used in their business during the years 1827, 1828, and 1829, and who were the book-keepers, and where the books now are, &c. That the defendants were insolvent long previous to the pretended shipment. That they commenced their business with a small capital, and had not sufficient to purchase the doubloons; and so it would appear if they would set forth what capital they had when they commenced partnership, and if the same consisted of cash, what cash—and if of goods, what goods—and if of bills of exchange, who were liable thereon—and if of debts, from whom due, and where the debtors now live or are to be found. That the defendants carried on business with a daily loss; and so it would appear if they would set forth what sums of money &c. were paid, and what received, to and by them between the 31st December, 1827, and the 31st December, 1829, and what was the capital in hand at those respective times, and of what the same consisted. That they ought to set forth the amount of goods bought by them in each and every month between the 31st December, 1827, and the 31st December, 1829, and when and of whom the same were bought, and to whom sold, and where delivered; and for how much the same were sold, and when, where, and by whom the same were paid for. Similar charges were made as to bills of exchange received and paid by the firm between the respective times above mentioned. In addition to these and many other charges of a like nature, the bill contained charges more

immediately bearing upon the subject of the purchase, namely, in relation to the accommodation bills, and the correspondence between the defendants and their agents, and the alleged consequences.

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Mr. Simptinson, Mr. Sidebottom, and Mr. Heathfield, now moved that the amended bill might be taken off the file for irregularity, contending that the amendments were not within the terms of the order, and that, independently of the order, they were impertinent and inquisitorial; that the plaintiff had already had an inspection of the defendants' books so far as related to this transaction, and had no right to ask for a general inspection of the books, or for an account of the dealings of the partnership from its commencement; that it was not alleged, either in the original bill or in the affidavits that the firm was insolvent at the time of the shipment; that the statement in the affidavits as to the defendants wanting capital to make this shipment, was not sufficient to warrant a general charge of insolvency; and that such a charge, even in an original bill, would have been impertinent, and not called for by the justice of the case.

Mr. G. Richards, (with whom was *Mr. J. Russell*), contra.—The plaintiff had a right to ascertain whether the defendants had the means of purchasing the doubloons. He had also a right to the inspection of the entries in the books, in order to see from whom the doubloons were alleged to be purchased, and to call the party named in those entries to contradict the fact. Many of the books of 1829 refer to those of former years. With respect to the charge of insolvency, the order gave the plaintiff power to examine as to the matters mentioned in the affidavits, and amongst those matters was the defendants' want of capital. The only way in which the defendants could shew that they had capital, was by giving an account of

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their dealings and transactions since 1827. The doubloons were purchased by means of accommodation bills. [The *Lord Chief Baron*.—Unless the defendants said that they purchased them with their own capital, it is immaterial whether they purchased them with borrowed money or not.] At all events, accommodation bills do not form a portion of the capital of a house, though money may be raised upon them. Now in the books they may appear as bills taken in the ordinary course of trade, whereas the plaintiff may shew the contrary. Upon this point, therefore, the plaintiff is entitled to an inspection of the entries in the books. He is also entitled to a full discovery of the correspondence with the consignees.

Mr. Simpkison, in reply.

THE LORD CHIEF BARON—I have some recollection of this order: I hope that I was not the means of misleading the parties. The order was settled by the learned counsel on both sides, and I supposed that the object of it had been understood and agreed upon. I conceive, that in limiting the amendments to the facts suggested by the affidavits, and to an examination of the books, it was not intended to give the underwriters a more general power of discovery than they had before. They were to confine their inquiries to matters put in issue by the answer to the original bill. It was not intended to submit the parties to a general inquisition, such as the answer could not have justified, as to the dealings and transactions of the firm.

Nothing is more difficult to ascertain, and nothing more dangerous than to limit, the right of underwriters to discovery. It has been considered, at all times and in all countries, that in cases of this nature the underwriters are entitled, not only to a discovery of all the circumstances attending the original contract, but to the whole history

of the adventure and loss. Therefore it is very difficult, and, perhaps, dangerous, to limit the power of the underwriters in that respect. If, for example, upon a bill of discovery by underwriters, the assured stated by their answer that they had shipped the goods in question, and had purchased them with part of their spare capital, and by some subsequent fact it became known to the underwriters that they had no spare capital, but had been in the habit of borrowing money to sustain their credit, then the inquiry whether they were insolvent at the time of the alleged shipment might become important, and such a fact being discovered would justify an amendment of the bill, in order to ask the defendants how they could reconcile that with their original statement; so that there may be cases where an inquiry, as to the insolvency of the assured at a particular time, may be important. Now, according to my recollection of the original answer—but my memory in these respects is very deceitful—I thought it had stated that the defendants had purchased the doubloons with their own capital. That was my impression, and I requested Mr. *Richards* to read it, for the purpose of shewing that such was its purport. I find, however, that the answer does not say that, but leaves that matter *in ambiguo*. It says that the doubloons were purchased of a house with whom they had a running account, and that for some they gave credit in account, and for others they paid by means of bills. It is not material, therefore, whether they were obliged to borrow the money for that purpose, for such facts as those are quite consistent with their having made the purchase. The true question is, whether they shipped these goods. If they had said these were superabundant goods of their own, they would have put their insolvency in issue; but under the circumstances I think that all the questions as to their insolvency are immaterial, inquisitorial, and not justified except by a very extreme case indeed.

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With respect to the entries in the books, the general rule is, that the underwriter has a right to the inspection of every thing relating to the particular transaction in dispute. If there be any doubt as to the purchase, or the shipment, or the value of the goods, or on any question as to false papers imposed on the underwriter, he has a right to the inspection of the books of the assured in relation to those individual matters, but not in relation to matters not connected with the transaction. If by his answer the defendant makes any other matter material to the inquiry, then he makes it the subject of an amended bill; but otherwise the underwriter has no right to an inspection of the entries, beyond the individual transaction in which he is interested. Here, all the grounds for suspicion of the fidelity of the entries are fair subjects of amendment in any matter relating to the purchase, or, to go a step further, to the mode by which the bills are acquired, by which the defendants say they made the purchase. I should think such inquiries relevant, as arising from the facts put in issue by La Vie's affidavit. He raises the question, whether the facts as stated in the answer in relation to the purchase of the goods are true. But any question which does not so arise is immaterial, by the same rule as that which I have just now stated in regard to the question of insolvency.

Another question is, as to the accommodation bills. As to that I confess it does not appear to me important what were the particular bills which were given for the purchase. Suppose they were accommodation bills; still, if they were handed over to the sellers, it is equivalent to a payment. The important inquiry is, whether they knew to whom they gave and from whom they received those bills. At the same time, there would, even then, be a distinction between accommodation bills given to support the credit of the house generally, and the like bills given

for this particular transaction. In the former case the inquiry would be more limited than in the latter.

The inquiry as to the correspondence with the consignees is properly introduced into the amended bill. The correspondence with those persons may be very important, to shew whether any shipment was made to that house or not; whether, in truth, it was the same house or not to which the consignment is alleged to have been made. And upon the question, whether this was a *bond fide* purchase, the correspondence respecting it, and the books of that house—if the defendants have any controul over it—would be important. At all events, I cannot say that such an inquiry, so far as it relates to this transaction, is unimportant. If it goes to entries beyond this transaction, then it is unimportant.

Having stated this, I presume there will be no difficulty as to the mode of dealing with the bill.

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But a partner purchasing his copartner's share of assets (partnership property) is not entitled to the same as to title.
June 3rd, 1845

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C 2. 405

HENRY ROBINSON carried on the business of a brewer for many years, at Wigan and the adjoining places, in partnership with several persons in succession. The business was very extensive, and the partnership was possessed of considerable real estates of every species of tenure, some of which were held by the partners as tenants in common, and others by one or more partners in trust for the partnership. Some time after the establishment of this business the defendant Kearsley entered the firm, and he and Henry Robinson were the only partners at the time of Robinson's death. The partners were then interested in the business in equal moieties. Robinson

Upon the death of one of two partners, intestate, the personal representatives of the deceased partner agreed to sell his moiety of the real property of the partnership to the surviving partner, and at the same time stipulated that they would furnish him at their own expense with an abstract of their title to

that moiety:—*Held*, that they were bound to furnish the usual abstract of title, and not merely the letters of administration under which they acted in relation to the intestate's personal estate.

Declaration, that real estate, held for partnership purposes, is in the nature of personal estate.

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died in August, 1833, intestate, leaving two children only, namely, George, his heir-at-law, and Ann, the wife of Thomas Morris.

Soon after the intestate's death, George Robinson was found a lunatic, and Mr. and Mrs. Morris were appointed joint committee of his estate. Letters of administration of the intestate's personal estate were also granted to Mrs. Morris.

Upon the death of Robinson, Kearsley agreed to purchase Robinson's moiety of the brewery business, and of the property belonging to the partnership; but doubts being suggested whether Robinson's interest in the real property of the partnership had descended to George Robinson, as his heir-at-law, or to Mrs. Morris, as his personal representative, it was arranged that a suit in equity should be instituted for the purpose of determining that point. At the same time an agreement was executed, by which Morris and his wife, in their characters of committee and administratrix, agreed to sell, and Kearsley agreed to purchase, all the moiety or share late of Henry Robinson, (and which was then vested in them the said Thomas Morris and Ann, his wife, and George Robinson, or one of them,) of and in the fee simple and inheritance, and all other the estate and interest in the several freehold, copyhold, lifehold, and leasehold hereditaments mentioned in the schedule to the agreement, and which were the property of the partnership, and also the interest late of Henry Robinson in the partnership chattels, subject to a stipulation for making void the agreement, so far as regarded the real property, and for an abatement of the purchase money, in the event of the court declaring that the real property descended upon George Robinson, as the heir-at-law of his father. The agreement also contained the following clause:—"And the said Thomas Morris and Ann, his wife, do hereby promise and agree to deliver unto the said John Hodson Kearsley, on or before the first day of August now next

ensuing, at their own expense, an abstract of their title to the said moiety, share, estate, and interest, late of the said Henry Robinson, deceased, of and in the said freehold, copyhold, lifehold, and leasehold hereditaments and premises hereby by them agreed to be sold as aforesaid. And it is hereby agreed by and between the said parties hereto, that the said John Hodson Kearsley shall purchase the said moiety, share, estate, and interest, late of the said Henry Robinson, deceased, of and in the said freehold, copyhold, lifehold, and leasehold hereditaments and premises, subject to all defects or imperfections of title subsisting before the commencement of the title of the said late Henry Robinson, deceased, and not occasioned by any act done by the said Henry Robinson, deceased, or by any person or persons claiming under or in trust for him. And the said Thomas Morris and Ann his wife shall not be required to produce the title of the superior or ground landlord of the said leasehold premises, or any part thereof, nor of any surrendered lease thereof."

The present suit having been instituted for the purpose mentioned in the foregoing agreement, the Court, by an order made on further directions in November, 1835, declared that the several lands, hereditaments, and premises belonging to the partnership, ought to be considered in the nature of personal estate, and that George Robinson was a trustee, on behalf of the partnership, of such part of the premises as were vested in him as heir-at-law or customary heir of Henry Robinson. And the Court further ordered, that the agreement should be specifically performed; that an account should be taken of what remained due in respect of the purchase money; and that upon the plaintiffs, according to the provisions of the agreement, delivering to the defendant Kearsley, at their own expense, an abstract of their title to the moiety, share, &c., late of Henry Robinson, deceased, in the real property, and executing proper conveyances, the defendant,

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should pay what should be found due from him upon taking the aforesaid account.

Mr. *Spence*, and Mr. *Sutton Sharpe*, now moved that the plaintiff might be ordered, within ten months, to deliver an abstract of title to the freehold and copyhold property in the pleadings mentioned; and they insisted that, under the terms of the agreement, it was intended to furnish the usual abstract of title, and not merely an abstract of the plaintiff's own title, derived from Henry Robinson by means of the letters of administration. This is clear from that proviso in the agreement by which the plaintiffs are exempted from the necessity of delivering an abstract of the landlord's title to the leaseholds. Besides, an abstract of *their* title is an abstract of all the deeds which give them the property. Such an abstract is necessary, because the defendant has a right to call upon the vendor for a title free from incumbrances, such as unsatisfied mortgages, or outstanding terms.

Mr. *G. Richards*, contra.—The words of the agreement do not bear out the proposition contended for on the other side. Robinson and Kearsley being partners in trade, it was necessary, for the purposes of their trade, that this freehold and copyhold property should be conveyed to them. When that was done, the partners were bound to see that a good title was made to the property. There is no reason, therefore, why another title should be made, anterior to Robinson's. Under such circumstances, and the plaintiffs being, in equity, both the real and personal representatives of Robinson, the words "their title" can only mean their title subsequently to Henry Robinson's death. That consists of their being committee of the estate and person of the lunatic, and administratrix of the intestate's personal estate. The proceedings in the lunacy, and the letters of administration,

are the evidence of their title. Besides, it is expressly stipulated, that Kearsley shall take the property subject to the defects in Robinson's title. That distinguishes his title from the plaintiff's. [The *Lord Chief Baron*.—That very clause shews that the title of Henry Robinson was to be assigned by them. Then how can you make good your contract, without shewing that Henry Robinson had a title?] We have not contracted to shew that Henry Robinson had a title. Whatever Robinson had, Kearsley bought. He took Robinson's title for better for worse.

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Mr. *Spence*, in reply, observed, that some of the property was purchased before Kearsley joined the firm, as to which he could have had nothing to do with accepting the title.

THE LORD CHIEF BARON.—The defendant, having formerly paid a sum of money on receiving a conveyance of a part of what was partnership property without an abstract of title, may now have good reason to say that he wishes to have an abstract. He may wish to have such a title as may enable him to part with the property to a purchaser. The stipulation, that the title shall be made "at the expense" of the vendor, seems to me to shew that the parties had some object of this kind. Besides, suppose a man make a contract to purchase all the interest of A. B. in certain premises, without a warranty of title at all: it is enough to say, take my title, such as it is; but it would be hard to find any meaning in these words, unless more was meant than what has been suggested by the plaintiffs. It cannot, I think, be seriously urged, that the other party meant to have nothing but the letters of administration; and if not, to what extent must I limit the terms of the agreement? The defendant says, that, in contracting with Mrs. Morris, as administratrix of Henry Robinson, he meant, that she should give him the usual

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abstract of title to Robinson's estate at her own expense: I think she must. Unless Henry Robinson had some title, the administratrix had no title: and it is clear that in various parts of the contract, reference is made to his title. I think it a considerable question, whether, if his moiety had been purchased, subject to a mortgage, the defendant, under the terms of this agreement, would be obliged to take the property subject to that mortgage. Surely he ought at least to know whether such was the fact.

Motion granted.

June 3rd.

ANONYMOUS.

Defendant in contempt, living within the rules of the King's Bench, ordered to be committed to the Fleet.

THE defendant, who was in contempt, was living in great luxury within the rules of the King's Bench.

Mr. *Elderton* moved that he might be turned over to the Fleet, observing, that a party cannot have the benefit of the rules of the King's Bench when committed for a contempt. He cited *Lanquit v. Jones (a)*, as being analogous to the present case.

THE COURT ordered him to be committed to the Fleet charged with this contempt, and other contempts in other causes.

(a) 1 Str. 87.

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May 5th.

June 28th.

The Rev. GEORGE HALL v. EDWARD FARMER and

FRANCIS WILLIAMS.

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BILL by the vicar of Tenbury, in the county of Worcester, with the chapelry of Rochford annexed, for an account and satisfaction of the great and small tithes of that portion of a district called Sutton Park, which lies in the township of Sutton, and within the parish of Tenbury.

The parish of Tenbury consists of four hamlets or townships; namely, Tenbury Town, Tenbury Foreign, Borington, and Sutton, otherwise, Sutton Sturney. The district called Sutton Park lies partly within the chapelry of Sutton, and partly within the chapelry and parish of Rochford. The former part consists of about 425 acres, the latter part of about 200 acres. In the year 1718, that part of Sutton Park, which lies within the chapelry of Rochford, was disparked and thrown into tillage; and Mr. Read, who was then vicar of Tenbury with Rochford, filed his bill against Wollaston, the owner of that part of Sutton Park, claiming the great and small tithes of those lands; and he obtained a decree. Subsequently to that decree, these tithes were regularly enjoyed by the successive vicars of Tenbury and Rochford.

The present bill, after stating the above facts, and charging that the other portion of Sutton Park (lying within Tenbury) had been some years since disparked, and that the occupiers thereof had offered to the vicar 7l. as a compensation for the tithes, which had been refused, prayed an account of the great and small tithes of that portion against the defendant Farmer, as occupier. The defendant Williams was charged as owner of the lands in question, and as claiming an interest in the tithes by virtue of some alleged grant or conveyance.

The defendants, by their joint and several answer, denied the plaintiff's right to the tithes sought by the bill,

Vicar's bill for great and small tithes of an ancient park, which had been disparked and thrown into cultivation, dismissed; there being no evidence of perception or of receipt of compositions for tithes by the vicars in respect of the lands within that district, although it was proved that compositions for tithes had been regularly paid to the vicars in respect of the other lands in the township in which the park was situate.

A terrier without date, and bearing the signatures of various persons, having no addition or designation affixed to their names, is admissible in evidence on behalf of the vicar, if produced under circumstances shewing it to be a genuine document.

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insisting that the defendant Williams was entitled to the tithes of the lands in question, as parcel of the impropriate rectory of Tenbury. They denied the allegation in the bill as to the 7*l.* composition. By his further answer, the defendant Williams alleged that the tithes in question were granted by King Henry 8th, in the 31st year of his reign, as parcel of the rectory and church of Tenbury, to Richard Andrews and Nicholas Temple, and have been since severed from the rectory, and become vested in this defendant by divers good and effectual conveyances and assurances in the law; or that, in case the same were not so severed, and have not become so vested as aforesaid in this defendant, the *primâ facie* right and title thereto are now vested in the impropriate rector of the said rectory and church, save and except so far as his right to receive the same is or may be affected by the statute, &c. (2 & 3 Will. 4, c. 100), and not in the said complainant.

The cause now came on for hearing.

Mr. Boteler, Mr. Simpkinson, and Mr. Bethell, for the plaintiff.

Mr. Beames, and Mr. W. Eagle, for the defendants.

The plaintiff produced no endowment of the vicarage of Tenbury, there being no document of that nature to be found amongst the records of the bishop of Hereford. In order to supply that deficiency, and in support of the plaintiff's case generally, extracts were read from Pope Nicholas' Taxation, The Ecclesiastical Survey of 27 Hen. 8, and the Parliamentary Survey. The plaintiff also produced two terriers, marked X and Y, which were in the following terms:—

Article 67, } Item, to this article we present Sir Tho-
Tenbury. } mas Lucy, Knight, to be the right and
lawful patron of the vicarage. There is a chapel belong-

ing to it, called Rochford. What quantity of glebe belongeth thereto we know not. There is not any glebe but the churchyard, neither arable, meadow, or pasture. A vicarage house, a kitchen, a barn, with other houses of office. No common or pasture for sheep, but in the common fields. Some little hay the vicar hath, but not of all the parish; and the tithe-corn of the township of Sutton. And for other privileges we know of none. [Here followed the signatures of divers persons.]

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Teamburie, } A true terrier of the vicarage of Team-
 July 25th, 1637. } burie, taken by us, whose names are
 underwritten. Imprimis: one vicarage house; 2nd, one
 barn; 3rdly, one hemp blocke; 4thly, two gardens; 5thly,
 one portion of tithe from Sutton; 6thly, privy tithes from
 the rest of the parish. [Here followed the signatures of
 the vicar and churchwardens.]

In order to prove the date of the first terrier, the plaintiff produced a book from the archives of the bishop of Hereford, called *Scorie's Extracts*. In addition to the foregoing documents, he gave in evidence the proceedings in the cause of *Read v. Wollaston*.

The parol evidence for the plaintiff was to the effect that all tithes, except for hay and clover, were reputed to be payable to the vicars of Tenbury by the occupiers within Sutton Township, except Sutton Park. The plaintiff also proved that a composition for all tithes except the tithes of hay and clover had been paid to the vicars of Tenbury by the occupiers of lands in Sutton situate without the Park; but he failed to prove any payment of tithes or of composition for tithes by the occupiers within that part of the Park which was the subject of the present suit.

On the part of the defendant, the proceedings in a suit of *Gwynn v. Croydon* were given in evidence, by which it appeared, that in 1778 the vicar of Tenbury filed his bill against the then occupier of Sutton Park, for the great

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and small tithes of the remaining portion, and that the cause being heard upon bill and answer, the bill was dismissed.

Upon the plaintiff's counsel offering to give in evidence the terrier marked X, the defendant's counsel objected to its admissibility. This document was produced by a clerk of the Bishop's registrar at Hereford, and had been taken by him from the depository of the records of the Bishop's Court. It was, as has been already seen, without date, and although signed by various persons, it did not appear in what character they signed it, no designation being given to any of them. It was proved by other documents that Sir Thomas Lucy was patron of the vicarage in 1570.

Objected for the defendants.—This is no terrier. It is without a date, and it does not appear that any of the parties who signed it were either churchwardens, vicar, lord of the manor, or even resident within the parish. We do not deny that it is produced from a proper depository, but it is a mere solitary extract, and the office from which it comes is not an office for terriers only. It appears to be a return to some commission, which was not directed to proper persons or under proper authority. The commission itself must be produced to make an inquiry of this sort admissible in evidence: 1 *Phill. Evid. chap. 5, Inquisition*; *B. N. P. 228*; *Austin v. Nicholls (a)*, *Hardcastle v. Smithson (b)*.

For the plaintiff.—This is stated by the officer of the registry to be a terrier. Before the terriers of 1602 and 1603 were drawn up, it was the practice for the bishop to send round inquiries as to the property of the clergyman in each parish, and the parishioners made their return.

(a) 12 Vin. Abr. Evidence
[A. b. 42], pl. 2.

(b) Ambl. 41; 2 E. & Y. 96.

This is not like a private document, for it was drawn up in pursuance of a general custom, and the registrar having received it, we may presume at this distance of time that the signatures were by the proper parties. Besides, the defendants have precluded themselves from making the objection, because in their admissions they call it a terrier. They admit that the two paper writings marked X and Y contain true copies of two several terriers. The contents of the document afford internal evidence of its being a terrier.

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For the defendants, in reply.—Upon ejectment brought at Worcester by the vicar of Tenbury for some glebe land within the parish, the defendant having offered the present document in evidence, the plaintiff objected that it was not a terrier, and that if it was to be produced as an answer to an inquiry, the document containing the inquiry must be put in or accounted for; and *Coleridge, J.*, who tried the cause, rejected the evidence.

ALDERSON, B.—I entertain some doubt upon this point. It appears to me at present that the question does not turn upon whether this is a terrier or not. It is an ancient document, taken from the proper quarter and under the proper authority. A terrier is only one form of that species of document. The question is, whether this comes under circumstances sufficiently authenticating it as a genuine document. It is not necessary to produce the inquisition in these cases, if, without doing so, it appear satisfactorily to be an answer to a commission issuing under proper authority. I think that it is admissible in evidence here. At the same time I have no doubt that it was properly enough rejected at *Nisi Prius*, for in the trial of the ejectment which has been mentioned, it would not bind the parson if not signed by himself or his predecessors.

The evidence was received.

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Upon the merits of the case, the counsel for the plaintiff commented on the different nature of the defence now set up from that which was resorted to on the former occasion in the case of *Read v. Wollaston*. They then proceeded to contend that the vicar's title to the tithes now claimed, sufficiently appeared from the several documents which had been produced, taken collectively; namely, from Pope Nicholas's Taxation, the ecclesiastical survey, and the two terriers. They relied upon the case of *Donnison v. Elsley* (a), contending that, though the instrument produced for the plaintiff in that case was somewhat more explicit than any of the documents now produced, yet, upon the whole, that case must be considered as governing the present. The terrier of 1637, giving the vicar all the tithes in Sutton, and privy tithes in the rest of the parish, must be considered as conclusive on the subject. If not, it was inconsistent, not only with the other documents, but also with the usage within the parish; for it was clear that the vicars of Tenbury had received the tithes of Sutton generally, though not from this park. But the non-perception of tithes from this park was explained by the circumstance of its having been a deer-park, and not having been brought into cultivation till of late years. [Alderson, B.—The second terrier would not be inconsistent with the idea of two portions in Sutton, one in the vicar, and one in somebody else. The word "tithes" mentioned in that terrier means all sorts of tithes, as distinguished from privy tithes, but still only a portion.]

For the defendants.—It is necessary for the plaintiff to recover by the strength of his own case. The documents on which he relies are vague and of little authority. The Ecclesiastical Survey is no guide as to the nature of the things which it enumerates, but only as to the aggregate

(a) 1 M'Clel. & Y. 1.

amount of the receipts, and then it must be confirmed by usage: *Tamberlain v. Humphreys* (a). Here the usage is directly adverse to the claim now set up, founded on the Ecclesiastical Survey. If that document is intended to comprise the tithes of the park, the usage is against it. As to the terriers, the first, being without date, and signed by persons who do not describe themselves, is of little or no weight. The other was signed by the vicar, an interested party, asserting his own rights. He however did not put his rights so high as the present plaintiff, claiming only one portion of tithes in Sutton. The proceedings in the case of *Read v. Wollaston* have no application here, having reference solely to the tithes of lands in Rochford. This estate is more than 400 acres, and it is not pretended that tithe was ever paid for it. Perception in one part of a parish is not evidence of it in another part: *Armstrong v. Hewitt* (b). The case of *Gwynn v. Croydon* (c) as it really occurred, and not as it is stated in Wood, is an authority greatly in favour of the defendant. That cause was heard on a bill and answer, and the bill was dismissed.—The other authorities cited for the defendants were *Lady Dartmouth v. Roberts* (d), *Cunliffe v. Taylor* (e), and *Masters v. Fletcher* (f).

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Mr. Boteler, in reply, observed, that the plaintiff in *Gwynn v. Croydon* was only compelled to go to a hearing after he had left the living and some one else had been instituted.

ALDERSON, B.—In this case, which was a bill filed by the vicar of Tenbury, claiming the great and small tithes of a farm in the parish of Tenbury, I now propose to give the judgment of the Court.

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(a) 4 Gwill. 1345; 3 E. & Y. 1367.

(b) 4 Price, 216; 3 E. & Y. 835.

(c) 4 Wood. 588.

(d) 16 East, 334; 2 E. & Y. 655.

(e) 2 Price, 329; 3 E. & Y. 743

(f) 1 Younge, 25

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The land in question is part of an ancient park, situate partly within the parish of Rochford and partly within the township of Sutton in the parish of Tenbury. It appears that in 1718 a bill was filed by the then vicar, who was also rector of Rochford, claiming the tithes for that part of the park then lately broken up into tillage, which was situate within Rochford, and on that occasion the claim was established. In 1778 a similar claim was made in respect of the remaining part within Sutton, then also broken up into tillage, but with a different result. There, the vicar's bill was dismissed. Since that, and up to the time of the present suit, no perception of tithes has been had, nor is there any evidence whatever of any perception of tithes from the land in question. No endowment has been produced. But it appears from the old documents which have been produced that there was from time immemorial a vicarage, and that an endowed one, and that the endowment was valuable; and from the Ecclesiastical Survey, it appears that the endowment was of great and small tithes, to some extent at least. There are then two terriers produced in evidence by the vicar, the first about the year 1573, by which it appears he was entitled to the tithe corn in the township of Sutton; and the second, dated in 1637, by which he is stated to have one portion of tithes for Sutton, and privy tithes for the rest of the parish. This is the whole documentary evidence in the case.

The parol evidence is uniform, that, with the exception of the lands in question, all the rest of the township of Sutton is liable to pay great and small tithes (unless in some particular instances, where moduses are claimed) to the vicar of Tenbury. Now, if I am asked, what is the inference which under these circumstances, upon the whole evidence, the Court ought to draw, I have no difficulty in giving an answer. That ought to be the inference which, is consistent with the whole evidence, if possible. And it appears to me, that all may be consistent

with the supposition that the vicar was originally endowed with the great and small tithes within Sutton, but not with the tithes from the lands in question. The language in the terriers is, indeed, more susceptible of the extended signification contended for by the vicar; but the non-perception of tithes since this part of the land was first disparked in 1729, and the suit in 1778, appear to me far more cogent evidence. I am always desirous to give effect, if possible, to a long course of usage, where no rule of law or clear documents lead to another conclusion.

The bill must be dismissed with costs.

Decree accordingly.*

*1) Off. with some variation: 7 Cl. & Fin. 759.
2) Off. 7 Cl. & Fin. 761. (3) Off. 7 Cl. & Fin. 744.
1, HALL v. GODSON and others, (2) Same v. WHEELER and others, (3) Same v. CLEE and others.*

June 20th,
22nd, 28th.

IN these suits, the plaintiff, as vicar of Tenbury, claimed against the defendants, as occupiers within that parish, the tithes in kind of all titheable matters and things other than and except the tithes of corn and grain, yearly coming, growing, &c., within the respective hamlets or townships of Tenbury Town, Tenbury Foreign and Berrington; and the tithes in kind of all titheable matters and things coming &c. within the hamlet or township of Sutton Sturmev.

By his amended bills, the plaintiff charged that the church of Tenbury was anciently appropriated to the foreign or alien monastery of Lyra, and afterwards to the monastery of Shene, and that the vicarage was created or endowed within time of legal memory; and that long after such endowment the rectory of the said church, and the tithes belonging thereto, were granted by King

The words "privy tithes" are generally synonymous with "small tithes;" therefore, although the Ecclesiastical Survey appeared to distinguish between privy tithes and small tithes, yet this was held to be explained by a subsequent terrier, which mentioned privy tithes, in contradistinction to tithes in general, as being payable to the vicar; and, under these circumstances, supported by

evidence of former vicars having regularly received payments called "privy tithes," although those payments had been in some instances made for houses only, and in other instances omitted altogether, and although some portions of the small tithes were proved by the defendants to have been conveyed away:—*Held*, that the vicar was entitled to a decree for small tithes.

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Henry the Eighth unto certain persons, by whom or by those claiming under them divers grants, sales, alienations, and assurances have been made of the tithes to which they were entitled under or by virtue of the said grant, arising from divers portions and parcels of the lands lying within the said townships of Tenbury Town, Tenbury Foreign, and Berrington; but that all such grants, sales, alienations, and assurances have been of the tithes of corn and grain only, and not of any other tithes; and that the persons to whom and by whom the said royal grant, and such other grants, &c., have been made, have never taken, or enjoyed, or affected to be entitled to any other tithes than the tithes of corn and grain only. That under and by virtue of some of such grants, &c., some of the defendants have taken or enjoyed the tithes of some parts of the lands within the said three townships of the said parish, but that they have never received or claimed to receive from such lands any other tithes than the tithes of corn and grain only, or some composition or money payment in lieu thereof. That in respect of other tithes within the said three townships, compositions were anciently made with the vicars of Tenbury, and certain money payments in lieu thereof made to such vicars by the occupiers of lands, gardens, and orchards within Tenbury Town, Tenbury Foreign, and Berrington, in respect of such lands, gardens, and orchards, under the name of privy or private tithes, and which payments have occasionally varied in amount, and have never been made except in respect of lands. That the name privy or private tithes was intended to represent the tithes belonging to and received by the vicar, by way of distinction from those belonging to the community of the religious house to which the rectory was appropriated, and that no tithes called privy tithes were ever paid to the rectors of the said parish before the endowment of the vicarage. That payments under the name of privy tithes have been

paid to former vicars of Tenbury, in respect of all the lands occupied by the defendants, and that they ought to set forth an account thereof. That the plaintiff has always refused to receive the same, inasmuch as the same through neglect have for many years been suffered to continue at amounts much less in value than the tithes for which they are paid. That the defendants, if they shall deny that the plaintiff is entitled to the tithes hereby claimed, ought to set forth who is or are entitled thereto, and how and by what title; and whether any person or persons has or have ever, and when, received, taken, or enjoyed the same.

The defendants by their answer denied the plaintiff's right to the tithes of all the titheable matters &c. within Sutton Sturmeý, or to the tithes of all or any of the titheable matters within the rest of the parish of Tenbury. By their further answers, they admitted that the rectory of Tenbury was formerly part of the possessions of the monastery of Lyra. That upon the suppression of the alien monasteries, it became part of the possessions of the monastery of Shene, and that upon the dissolution of the monasteries, it became vested in the Crown. They stated, that in or about the 35th year of the reign of Henry VIII., the rectory, and the tithes and appurtenances thereto belonging, were, with divers lands and hereditaments, granted by the Crown to Richard Andrews and Nicholas Temple, and the heirs and assigns of the said Richard Andrews, for ever, at the yearly rent of 16s.

The defendants further stated their belief, that upon or soon after the appropriation of the said rectory of Tenbury, and the tithes and appurtenances thereof, to the said abbot and convent of Lyra, a vicar of Tenbury was nominated and appointed, and a vicarage created and endowed with the great and small tithes of the said hamlet or township of Sutton, otherwise Sutton Sturmeý, or some part thereof; except a certain part of the said last-mentioned

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township called Sutton Park; but that the said vicarage was not endowed with the tithes of any titheable matters or things arising, growing, or renewing within the townships of Tenbury Town, Tenbury Foreign, and Berrington, or any of them; but that all the tithes, as well great as small, of the last-mentioned townships, remained appropriated to the abbot and convent of Lyra; and ultimately became vested in Andrews and Temple, as before mentioned. That Andrews, the grantee from the Crown, sold and deposed of the rectory of Tenbury and the tithes thereof, including all and singular the tithes of the townships of Tenbury Town, Tenbury Foreign, and Berrington, to certain persons, who were also the owners of the lands comprised in the last-mentioned townships. That after such sale and conveyance, those owners, and their descendants, and the purchasers from them respectively, and their tenants, held and occupied their farms and lands freed from the payment of all tithes whatsoever, and that the owners and their descendants, and persons claiming under them, sold the said lands either together with the tithes thereof, or freed from the payment of all or any tithes in respect thereof. That the farms and lands of which the respective defendants were owners or occupiers, were purchased by their ancestors, or by the persons under whom they respectively derived title, and that they now held their farms and lands together with the tithes of the titheable matters thereof, or else freed and discharged from the payment of all tithes whatsoever. The defendants further stated their belief, that no tithes in kind, or any compensation or satisfaction for tithes, had of right been payable, or had ever been paid, by any of the owners or occupiers of lands in the townships of Tenbury Town, Tenbury Foreign, or Berrington, to the vicars of Tenbury; but that all such tithes had of right been payable and paid to or retained by the improper rector of the rectory of Tenbury, or the persons to whom

the tithes or the portions of the said tithes had from time to time been sold and conveyed, or the persons claiming or deriving tithes under them respectively.

With respect to the privy tithes, the defendants alleged that for a great many years past certain small payments had been made by some, but not by all the occupiers of houses, farms, and lands, in the said townships of Tenbury town, Tenbury Foreign, and Berrington, to the vicar for the time being of the said vicarage of Tenbury, in the name of "Privy Tithes," and which payments had, as the said defendant believed, been from time to time made in the nature of personal tithes, or oblations, or obventions, and not as moduses or compositions for the tithes of any titheable matters or things had, grown, or produced within the said hamlets or townships, or any of them, such payments having been made by the occupiers of houses only, as well as by the occupiers of houses and lands.

The plaintiff being unable to produce any endowment, recourse was had to the same ancient documents and terriers (a) as were produced, on his behalf, in the last cause. Those documents, particularly Pope Nicholas' Taxation, the Ecclesiastical Survey, and the Parliamentary Survey, were likewise read for the plaintiff, with a view to shew the value of the vicarage. The Ecclesiastical Survey was to the following effect:—

Magister Richardus Shute, vicarius	}	x.	viii.	viii.
perpetuus ecclesiæ habet in decimis				
prædialibus videlicet garbarum et fæ-				
ni et unius molendini vicariæ suæ præ-				
dictæ communibus annis pertinentibus				
In libro suo comput' Paschat' privata-	}			
rum decimarum comm. ann.				

xx.

(a) See ante, p. 146.

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	In decimis ovium venalium comm. ann.	xxiii. iiij.
	In mortuariis comm. ann.	iiij. iiij.
	In minoribus decimis viz. porcorum, anserum, canapum, lini, ceræ, et mellis } ac aliorum consimilium comm. ann.	xxx. vi.
	Item in emolument' et p'ficuis capellæ } de Rochford comm. ann.	v. vi. viii.

The plaintiff likewise produced the grant by Hen. VIII. of the rectory of Tenbury to Andrews and Temple, with a view of shewing that it was a grant generally of the rectory with its appurtenances, and did not affect the vicarage. He also produced a great number of receipts for privy tithes, given by Mr. Rocke, the late vicar of Tenbury, in many of which those tithes were expressed to have been paid in respect of particular lands and houses.

The parol evidence for the plaintiff was to the effect, that in the three townships no other tithes had ever been demanded or taken as great or rectorial tithes, besides the tithes of corn and grain: That the tithes which had been conveyed from one owner to another within these townships, were invariably those of corn and grain only: That tithes, called privy tithes, had been annually paid to successive vicars, in respect of particular lands and houses: That Easter offerings were collected annually for the vicar, but that the privy tithes were independent of the Easter offerings, and were collected at a different time of the year, namely, at Whitsuntide, after due notice of such collection had been given in church: That tithes, however, or money-payments for tithes, had not been paid to the vicar by the owners generally within the three townships, in respect of their lands.

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The documentary evidencé for the defendants comprised, in addition to the before-mentioned surveys, a grant, dated in 1416, from the Crown to the priory and monks of East Sheen, of all lands, tenements, tithes, &c., of the rectory of Tenbury, together with the advowson of Tenbury. The before-mentioned grant by king Henry VIII. to Andrews and Temple, which was of the rectory and church of Tenbury, with its appurtenances, and all lands, tenements, meadows, feedings, pastures, glebes, tithes, oblations, obventions, pensions, profits, commodities, and emoluments thereto belonging, and also the advowsons, donations, presentations, free dispositions, and rights of patronage of the vicarage of the church of Tenbury aforesaid, and the chapelry of Layones and Rochford; the terrier X (a), (for the purpose of shewing that Sir Thomas Lucy was patron of the vicarage of Tenbury, which it appeared from other sources that he had acquired in right of his wife, Joyce, the daughter of Thomas Aston, Esq., who died in 1546, and who was tenant of the lands comprehended in the royal grant); an *inquisitio post mortem*, 10th September, 1601, of Joyce, the widow of Sir Thomas Lucy; an *inquisitio post mortem*, June, 1606, of Sir Thomas Lucy, the son; a licence, 22d April, 1621, 19 Jac. 1, to Sir Thomas Lucy, a descendant of the before-mentioned Lucy and Alice his wife, to alienate the rectory and tithes generally. The defendant then gave in evidence certain conveyances made by the last-named Sir T. Lucy and Alice his wife, by one of which certain lands in Tenbury Town, together with the tithe of corn, grain, sheép, flax, and hemp, and all tithes, great and small, belonging thereto, were conveyed to Richard Milwood, Rowland Corbett, and Richard Huite, and their heirs; and by another of which the parsonage and lands adjoining, together with all tithe of corn,

(a) See ante, p. 146.

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grain, sheep, wool, lambs, flax, hemp, and other tithes whatsoever, great as well as small, growing, arising, or renewing within and upon the premises, were conveyed to the same parties. The defendants then traced these lands and tithes by a regular succession of documents into the possession of the respective parties who now hold the same, namely, Henry Williams, Esq., and the Master and Fellows of Pembroke College, Oxford. In addition to the deeds and documents necessary to deduce the foregoing titles to small tithes, the defendants gave in evidence the proceedings in the cause of *Gwynn v. Croydon*, and Mr. Locke's receipts for privy tithes.

The parol evidence for the defendants was to the effect that no tithes in kind, or any composition for tithes, had ever been rendered or set out to the vicar of Tenbury in respect of the three townships of Tenbury Town, Tenbury Foreign, or Berrington; and that no moduses had ever been known to have been paid to him for such tithes: That no money payments had ever been made to the vicar by the occupiers of farms, &c., within these townships, except a stipend called privy tithes, which were paid sometimes by the occupiers of land without houses, and sometimes by the occupiers of houses without lands. The defendants' witnesses, however, admitted on their cross-examination, that it was reputed generally within the parish that the owners of the great tithes were entitled to the tithes of corn and grain only.

Mr. Boteler, Mr. Simpkinton, and Mr. Bethell, for the plaintiff.—Considering the question solely with reference to the documents, the defendants' construction of them cannot be maintained. No one can come to any other conclusion than that, in Sutton, the vicar had the great tithes generally, though as to the hay there may be some uncertainty. Their hypothesis is, that all the tithes in Sutton belonged to the vicar, except the tithes of Sutton Park;

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and that in the other townships all the other tithes belonged to the rector, except the privy tithes. There is nothing, however, upon the documents, to support that view of the question. Then what has been the state of things, as to the enjoyment of the tithes? The vicars have received payment of privy tithes, though payment by some occupiers has been neglected, from the circumstance of the lands being cut off from the rest of the parish. The occupiers were uniformly called upon to attend the vicar on certain days and pay their privy tithes, those words being used in a sense equivalent to that of small tithes. As to the rectorial tithes, in some instances, no doubt, the tithes of corn and grain have been conveyed to the owners of the land, but that has not been the universal practice, and was not done till 1798, and then the conveyances were of the tithes of corn and grain only.

This state of things, coupled with the documents, completes the vicar's title. Unless the defendants can shew title to tithe and non-payment to the vicar, they have no defence. The plaintiff relies on evidence of receipt of tithes generally, as small tithes; and the defendants, by merely giving those tithes a new name, without producing the necessary corresponding evidence, cannot alter the vicar's rights. But, in addition to the privy tithes there are Easter offerings. This also is a rural parish, and therefore it is not probable that these privy tithes were in the nature of oblations or stipendiary payments, or personal tithes for houses. Blackstone speaks of privy tithes as synonymous with small tithes. *Bl. Comm.* vol. i. p. 387. The plaintiff's witnesses corroborate that authority. As to the hay, it is included in the privy tithes, as tithes of lamb and wool are often received among tithes of corn and hay.

The value of the vicarage may be gathered from the documentary evidence. The Ecclesiastical Survey and Pope Nicholas's Taxation have been objected to, as not

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being accurate as to value. But the defendants must shew that the inaccuracy consisted in over-valuing the living, for the inaccuracy has always been under value. At the time of Pope Nicholas's Taxation, ten marks per annum was half the value of the rectory. In the Nonæ Rolls the aggregate value of the rectory and vicarage is stated to be the same as in Pope Nicholas's Taxation, viz. 20*l*. The Ecclesiastical Survey is also in favour of the plaintiff, as far as it goes; not merely mentioning privy tithes, but a variety of other tithes. Can the defendants contend, in the face of this document, that the vicar is not entitled to tithes at all except in Sutton, or that these words will not pass all small tithes? What difference can it make whether the vicar's rights are specified in the Ecclesiastical Survey or an endowment. No doubt the Survey is not conclusive evidence of value, but as the terms of an endowment may be enlarged or confined by usage, so may the statements in the Ecclesiastical Survey. The Court had in several cases treated the Ecclesiastical Survey as amounting to an endowment; *Cunliffe v. Taylor* (a), *Kennicott v. Watson* (b), *Armstrong v. Hewitt* (c). In *Masters v. Fletcher* (d), Lord *Lyndhurst* differed in opinion from *Thompson*, C. B., as to the force of the words *decimæ minores* in the Ecclesiastical Survey, but in every other respect his Lordship's judgment confirms the preceding authorities. In the present case, no question upon those general words arises, because the words of the Survey are express and unambiguous. They are all uncontrolled by usage, and uncontradicted by the terriers and other documents, in which the words "privy tithes" are intended to comprehend all small tithes. [*Alderson*, B.—Suppose it appears that payments are made in respect of small tithes, and also that the payments have been uni-

- (a) 2 Price, 329; 3 E. & Y. 743. 3 E. & Y. 835.
 (b) 2 Price, 250; 3 E. & Y. 690. (d) 1 Younge, 36.
 (c) 4 Price, 216; 1 Wil. 119;

form as far as the evidence extends,—it seems questionable whether the Court may not draw the inference of the existence of a modus, though not pleaded]. The defendants say expressly that the payments made were not moduses nor compensations for tithes. There are many cases where, though the payments have been uniform, yet the Court will not raise the inference of a modus. Here they repudiate the modus. Upon the subject of privy tithes the text writers, with the exception of Blackstone, are silent; but those words have frequently occurred in the reported cases. In *Gibson v. Peacock* (a), the word “altarage” was held to be equivalent to minute or small tithes. In *Ekins v. Dormer* (b), the words “privy tithes” are expressly used for small tithes.

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Mr. *Swanston*, Mr. *Godson*, and Mr. *Younge*, for the defendants.—The plaintiff’s counsel call upon us to shew our title to the whole of the tithes, but they have not touched upon the essential point for consideration, namely, the title of the vicar. This is a most weak case. The demand is made without any colour of right to institute such a suit. No endowment is produced. Something is said about usage, but the only tangible foundation for it is a transaction called the payment of privy tithes. That is represented to have been made to the vicar, but on what account or for what reason is a secret. The present vicar, following his predecessors, has received various payments of this nature, though he has not received tithe of corn and grain; but it is a strange conclusion to draw from this circumstance, that the vicars are therefore entitled to every species of tithe except corn and grain. The Court will not give effect to the claim of a vicar beyond his common-law right, except upon clear evidence. There

(a) 1 *Younge*, 184.

(b) 3 *Atk.* 534; 2 *E. & Y.* 108.

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is no common-law right to these tithes; if there is, he is bound to make it out.

That the payments which have been made to the vicar, under the description of privy tithes, are not of the character of small tithes, is clear from several circumstances. They have been made for houses without lands, and in respect of things not titheable; they have not been made by all the owners or occupiers, but by some only. With a single exception, they have been uniform. In addition to this, tithes by custom in some parishes are not rateable to the poor, and that is the case in Sutton; but we shew that these payments were the subject of rate. With respect to the documents which the vicar produces, if we shew that they are consistent with our case, a decree cannot be had against us. Now the plaintiff's whole case consists in making out that privy tithes are synonymous with small tithes, and yet the Ecclesiastical Survey expressly distinguishes the one from the other. Besides, how can such a document as the first terrier, containing such an observation as it does, without respect to tithe hay, be brought forward in support of the vicar's case? The possession of the defendants is perfectly consistent with such documents as these, and your Lordship will not disturb it.

The defendants contend that privy tithes are in the nature of rent. Under the grantees of the Crown, the tithes are held by various persons, amongst whom are the defendants. The grantees granted the tithes out again, some in general terms, others, including the small tithes, specifically. Here the vicar sets up a presumptive title against the actual title under the grant. He claims by payments, and he sets them up in such a manner as afford a legal presumption that they are moduses. If the vicar, therefore, has any case at all, he has proceeded in such a manner as to bar his right to tithe in kind. If he shews

only a right to a composition, it is submitted that the bill must be dismissed.

These payments, however, in whatever they originated, are not compositions for small tithes. There is clear evidence by reputation, that the lands in these three townships are free from all tithe except that of corn and grain; and the documents produced by the vicar cannot affect that evidence. The case of *Canliffe v. Taylor* has never been approved of. That of *Armstrong v. Hewitt* is in favour of the defendants, because, there, the Court refused to make a decree establishing the vicar's title to small tithes generally; but confined his right to those particular instances in which perception by the vicars was expressly proved. [*Alderson, B.*—That case only shews, that where a vicar stands upon usage, he cannot have relief beyond his proof of perception. Here the question turns on the meaning of the words "privy tithes," as applied to certain payments which have been received.] The defendants shew a direct title to the tithes in dispute, and not a mere presumptive title. Their title is derived from the Crown, and no usage adverse to it has been proved. The privy tithes relied upon by the vicar, are evidently of the nature of these charities, as enumerated by Mirehouse (*a*). [*Alderson, B.*—Their strong argument is, that if *decimæ minores*, in the Ecclesiastical Survey, is not the same as privy tithes, mentioned in the tertier, there is no accounting for their being conveyed in the interim.] There is no authority, but that of Blackstone, for considering privy tithes and small tithes the same thing. The reason why writers on tithes have not defined privy tithes is, that there is no instance in the case of a vicar's bill, where the words "privy tithes," standing alone, without the additional words, "minute tithes," &c., have ever been held to mean small tithes. *Ekins v. Dormer* (*b*), was the case

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(*a*) Mirehouse on Tithes, p. 102, (*b*) 3 Atk. 534; 2 E. & Y. 108.
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of a rector. The words used are either "minute and privy tithes," or "small and privy tithes." It is clear therefore that the plaintiff is bound to prove an actual perception of small tithes. Having failed to do so, it follows that, as he could not under such circumstances have a decree against the rector, he cannot have a decree against the defendants, who stand *in loco rectoris*: *Willis v. Farrer (a)*, *Wyld v. Ward (b)*, *Collins v. Gresley (c)*.

Mr. Boteler, in reply, admitted that the plaintiff's case, so far as regarded the tithe of hay, had not been made out, but he contended that, on all other points, it was strengthened by the documents which had been produced by the defendants. It was clear, from the surveys and terriers, that the vicarage was originally endowed both with glebe lands and small tithes of very considerable value, and this inference had not been rebutted by any evidence offered by the defendants. He relied on the expressions of the second terrier, and the authority of Blackstone.

June 28th.

ALDERSON, B.—In these cases the question also (*d*) is as to the extent of the endowment of the vicarage of Tenbury.

The older documents, as I have before stated, only shew an endowment, but not its extent or nature. The Parliamentary Survey is to the same effect. These, therefore may be laid out of the case.

The Ecclesiastical Survey is more definite. It speaks of the vicarage as being entitled to great tithes and to one mill—to Easter dues and other oblations on the four offering days—to tithes of sheep for sale—to mortuaries,

(a) 2 Y. & J. 217.

(b) 3 Y. & J. 192.

(c) 2 Younge, 1.

(d) This judgment was given immediately after that in *Hall v. Farmer*, ante, p. 151.

and to small tithes, to wit; pigs, geese, hemp, flax, wax, and honey, and other like things.

Now, *prima facie*, these words ought to be taken generally, as denoting a right to the tithes coextensive with the vicarage itself. But undoubtedly they may bear a more restricted sense, and may be taken to mean, if the other documents and the usage require it, a right of a more limited extent. And the next documents put in by the plaintiff, clearly limit the right as to the predial tithes, to the whole or a part of the township of Sutton alone. This appears from both the terriers. As to the first of these terriers, its only effect is to make this limitation; but on the subject of the small tithes, and the extent through which they are payable, it is wholly silent. The second terrier, of 1637, is not so. It speaks of the vicar being entitled to a portion of tithes from Sutton, which I think means the tithes generally, great and small, out of the whole or a part of Sutton; and to privy tithes from the rest of the parish.

Now, what are privy tithes? I think, in their ordinary meaning, they would be the small or vicarial tithes—that is the meaning in which Blackstone uses the words. And the usage of this parish shews that they certainly are not confined to Easter offerings. For it is clear from the evidence, that the vicar has Easter offerings, and also another set of payments, which are denominated privy tithes; and which seem to have been payments made for many years by persons having lands, by persons having houses, and by persons having both lands and houses. These payments have been made very generally; and, indeed, almost universally through the three townships. There are, certainly, instances where persons have not paid; but I think those instances are not more frequent than are to be ordinarily expected from the negligent, or, perhaps, indulgent mode in which such payments have usually been collected by clergymen not willing to excite

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hostility to themselves, by insisting on their extreme rights. I find no class exempted from the payment, so as to form any line of distinction between them and their neighbours. Nor do these exemptions, if they exist, appear to me to shew that these are stipendiary payments rather than compositions for small tithes. They are equally consistent or inconsistent with either hypothesis.

Then what construction is the Court to put on the expression *privy tithes* in the *terrier*? Its most natural meaning appears to me to be that which Blackstone gives to it. The usage is not inconsistent with this construction, for there is no satisfactory explanation, I think, to be found in the evidence as to the nature of these payments. They seem to me to be old compositions for the small tithes. Indeed, if the defence had been different, and the defendants had contended, admitting the vicar's endowment, that these were ancient moduses in lieu of small tithes, I might have had perhaps more difficulty in the case. But the defendants disclaim such a defence altogether, and rest upon a denial of the vicar's right to the small tithes, which they contend belong either to the rector, or were conveyed to themselves with their lands from the rector. They have traced two parcels of lands conveyed with the small tithes belonging to them—one to Mr. Williams, another to Pembroke College, Oxford. These are traced back to the rectors originally, and seem both comprised in a conveyance made by Sir Thomas Lucy and Alice his wife, to Milward and another, under a licence to alienate, obtained for that purpose from the Crown, in the reign of James the First. But the original conveyance is of the parsonage glebe and other lands, probably belonging to the rectory; and is not, therefore, such a conveyance of the tithes as materially to affect the present question. For the tithes of the lands belonging to the rectors may very probably not have been comprised in the vicar's original endowment, and yet his endowment as to the small tithes, throughout the rest of

the three townships, may have been general. These are the only instances in which any conveyances of the small tithes have been produced by the defendants. On the other hand, there is a total absence, so far as the evidence goes, of any claim by the rector to the small tithes—and unless they are comprised in the endowment of the vicar, there is no rational account to be given of them.

Upon the whole view of the evidence, I have come to the conclusion that I ought to construe the words in the Ecclesiastical Survey and the terrier of 1637 in their most natural and ordinary sense, and that, if I do so, they afford very cogent evidence that the small or vicarial tithes throughout the three townships, were comprised in the original endowment of the vicar. This is in accordance with the general probabilities in such cases. It is the only reasonable explanation of the total absence of claim by the rectors of any thing beyond the tithes of corn and hay, and is not, as it seems to me, at all inconsistent with the payments proved to have been made, treating these payments, as I think they ought to be treated, as ancient compositions for these tithes, and which are not claimed by the defendants, nor indeed proved by any reasonable evidence (if the case be left as at present) to be moduses in lieu of them.

I have now, shortly, gone through the whole of the evidence. There is no disputed fact between the parties for the consideration of a jury. The whole is a question rather as to the proper conclusion to be drawn from undisputed facts. That is, properly, therefore, a question for the Court itself. I shall not therefore send the case to an issue, but decide according to the opinion which I have formed on the facts before me.

I think, therefore, that the plaintiff must have a decree for an account of the small tithes claimed by him—and with costs. As to the hay, it is admitted that the bill must be dismissed with costs.

Decree accordingly.

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C. for many years employed D. as his attorney, and in the course of those years became largely indebted to D. for business done and money lent. From time to time D. delivered accounts to C., but received no payments of any considerable amount from his client. C. afterwards employed other attorneys. Ultimately, C. being threatened with an execution by a judgment creditor, applied to D. for his assistance, who

procured the money for him by way of mortgage, but stipulated that the mortgage should stand as a security for his own debt, as well as the judgment debt. C. having assented to this arrangement, executed the mortgage deed, and also a deed of trust of even date, which was prepared jointly by D. and the other attorneys of C., by which it was agreed that the mortgage should stand as a security for the amount of D.'s debt, to be settled by arbitration, and that in such settlement no prejudice should arise to D. by reason of the lapse of time:—*Held*, that this transaction did not amount to the receiving of a gratuity by an attorney from his client, and consequently, in the absence of any fraud, was sustainable in a court of equity.

A security which has been given to an attorney by his client for a debt really due, or as a reward for services already rendered, will not be set aside in equity.

Although a court of equity will not in general decree the specific performance of an agreement to refer to arbitration, or, on the death of an arbitrator, substitute the Master for the arbitrator, yet, where matters of account have been referred to arbitration, which fails by the death of the arbitrator, a party who refuses to supply the defect, by naming a new arbitrator, will receive no relief from a court of equity, except upon the terms of his doing equity; and those terms may consist in his consenting to the accounts being taken by the Master.

Where accounts are referred to an arbitrator, with a special agreement as to the mode in which they are to be taken, and afterwards, upon the failure of the arbitration, the same accounts are referred to the Master, he will be directed to take them in the ordinary way, and not according to the special agreement. Therefore, where, under such circumstances, it was one of the terms of the agreement that no advantage should be taken of the Statute of Limitations:—*Held*, that the Master was not to be ruled by that stipulation.

Quære, whether, since the stat. 9 Geo. 4, c. 14, the recital in a deed of the existence of a debt, coupled with parol evidence only as to its amount, is sufficient to take it out of the Statute of Limitations?

Where a verdict is taken, subject to the award of an arbitrator as to the amount of the debt, a court of law will, under circumstances, compel the appointment of a fresh arbitrator, but not where the verdict is taken subject to arbitration generally.

IN the year 1797, and for many years afterwards, the defendant, Thomas Dalby, was employed by the plaintiff as his solicitor, and he was also, with the approbation of the plaintiff, employed as the solicitor to the trustees under the will of the plaintiff's father. During the period between 1797 and 1818, the plaintiff became indebted to Thomas Dalby in a considerable sum of money, not only in respect of Dalby's professional services, but for various advances made from time to time to the plaintiff by Dalby and his father, and for interest due on those advances. In the year 1830, when the transaction on which these suits were founded took place, the total amount claimed by Thomas Dalby, in respect of these advances and interest, was about 4000*l*.

In 1818, the connection between the plaintiff and Thomas Dalby, in regard to law business, in a great measure,

ceased; and from that period till the year 1830, the plaintiff, with some trifling exceptions, employed Mr. Brock as his solicitor in the country, and Mr. Hall as his solicitor in London.

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In March 1830, a judgment having been recovered against the plaintiff by one Barber, for the sum of 7000*l.*, the goods of the plaintiff, at his dwelling-house in Leicestershire, were taken in execution under a fieri facias sued out upon that judgment. Upon that occasion the plaintiff and his solicitors, Messrs. Brock and Hall, applied to the defendants John Dalby and W. T. Dawson, for the loan of certain monies which the latter held as trustees, proposing at the same time that repayment of the loan should be secured by a mortgage of the plaintiff's real estates. The trustees, however, were dissatisfied with the proposed security, and refused to comply with this offer. About the same time the plaintiff applied to the defendant, Thomas Dalby, for his advice and assistance; and he, as well as others of the plaintiff's friends and advisers, endeavoured to prevail upon the judgment creditor to give the plaintiff further time for payment. This application however was refused, and in April, 1830, the plaintiff's goods were advertised for sale in the Leicester paper.

The plaintiff being now in great distress of mind at the prospect of a sale of his effects under the circumstances before mentioned, and having a family resident with him in his house, became daily more anxious for a settlement with the judgment creditor. At length, through the influence of Thomas Dalby, he prevailed upon John Dalby and W. T. Dawson to advance to him the 7000*l.* by way of mortgage, out of their trust-monies, Thomas Dalby at the same time depositing with the trustees some title-deeds of his own as an additional security for the repayment of the money. This advance however was made upon the express stipulation, that the accounts between Thomas Dalby and the plaintiff, from the year 1787, should be

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immediately adjusted, and that the plaintiff should execute a security, not only for the 7000*l.*, but for an additional sum sufficient to cover the balance due on Thomas Dalby's account. It was at the same time agreed, that Thomas Dalby should forthwith deliver to the plaintiff an account of all demands, and that if the plaintiff should object to any items, the same should be submitted to two arbitrators, one to be appointed by each party, with power to the arbitrators to choose an umpire, and that the security to be given by the plaintiff should be confined to the balance settled by amicable adjustment or by arbitration.

In pursuance of this agreement, arbitrators were appointed by the respective parties, and by indentures of lease and assignment and release, (which were prepared by Thomas Dalby), bearing date respectively the 21st and 22d of April, 1830, and made between the plaintiff of the one part, and John Dalby and W. T. Dawson of the other part; reciting, that the plaintiff having occasion on an emergency for the sum of 12,000*l.*, had applied to and requested the said John Dalby and W. T. Dawson to advance and lend him that sum, at the rate of interest and on the security thereafter contained, it was witnessed that in consideration of the sum of 12,000*l.*, paid to the plaintiff by the said John Dalby and W. T. Dawson, the receipt of which was thereby acknowledged, the plaintiff did thereby assign to the said John Dalby and W. T. Dawson, their executors &c., various leasehold estates held for divers terms of years, and did thereby release to the said John Dalby and W. T. Dawson, their heirs &c., certain freehold property, to hold &c., subject to a proviso for redemption on payment by the plaintiff to the said John Dalby and W. T. Dawson, and the survivor of them, and the heirs, executors, &c., of such survivor, of the sum of 12,000*l.*, with interest at 4*l.* 10*s.* per cent., on the 22d of October then next ensuing. The indenture contained a power of sale by the mortgagees on default of

payment of the principal money and interest pursuant to the stipulations contained in the deed. A receipt was endorsed upon the deed and signed by the plaintiff, whereby he acknowledged to have received 12,000*l*.

By an indenture, (prepared by Mr. Brock, but under the superintendence of Thomas Dalby), bearing even date with the indenture of assignment and release, and made between the plaintiff of the first part, Thomas Dalby of the second part, and John Dalby and W. T. Dawson of the third part, reciting the before-mentioned indentures, and that the plaintiff was indebted to the said Thomas Dalby in various sums of money, for money lent and advanced at various times, commencing in the year 1797, and for interest thereon to the then present time, and also for the amount of divers professional bills for business done by the said Thomas Dalby as the solicitor and attorney of the plaintiff, or on his account, the amount of which said several loans and bills was not yet then ascertained, and a balance was not yet struck between the said parties; and further reciting, that the plaintiff was willing to pay the said Thomas Dalby the amount which might appear to be due to him upon the said accounts, commencing on the day aforesaid, such amount to be ascertained and paid in the manner thereafter mentioned; and also reciting, that upon the treaty for the loan of the said sum of 12,000*l*., it was contemplated that the said Thomas Dalby should have been made a party to the said indenture of release; and that the amount which should have been found to be due to him on the balancing of the said accounts between him and the plaintiff, should have been paid to him on the execution thereof; but inasmuch as that balance was not then yet ascertained, it had been agreed between the parties thereto, that the sum of 5000*l*., part of the said sum of 12,000*l*., should be retained in the hands of the said John Dalby and W. T. Dawson, for the purpose of satisfying the said demand of the said John Dalby against the

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plaintiff when the balance should be ascertained, and that the surplus thereof, if any, should be paid to the plaintiff; and also reciting that the plaintiff had, on the said indenture of release, given a receipt for the said sum of 12,000*l.*, but the said John Dalby and W. T. Dawson had retained the said sum of 5000*l.*, part thereof, for the purposes thereinbefore mentioned respecting the same, as they did thereby admit and acknowledge. It was witnessed that the plaintiff, in pursuance of the said agreement on his part, did thereby covenant with the said Thomas Dalby, his executors and administrators, that he the plaintiff would, within fourteen days after the presentation to him by the said Thomas Dalby of accounts and bills against the plaintiff, which said accounts and bills the said Thomas Dalby did thereby covenant to present within two months from the date thereof, either express his willingness to abide by and admit the same, or otherwise express his intention of submitting the same to arbitration in manner thereafter mentioned. The deed then contained a mutual covenant between the plaintiff and Thomas Dalby, in case the plaintiff should desire an arbitration, to submit the accounts to the arbitration of two persons named in the deed, who, before they proceeded to business, should choose an umpire; and it was declared that the arbitration, either of the arbitrators or the umpire, should be made within two months after the accounts should have been submitted to their or his arbitration, and should be final and binding on the parties. The deed then stated, that it was thereby declared and agreed, by and between the plaintiff and the said Thomas Dalby, that in settling the said accounts, the said arbitrators or umpire should begin their investigation thereof from their first commencement in the year 1797, and that the lapse of time or nonclaim by the said Thomas Dalby should not prejudice his claims; and the plaintiff did thereby empower the said John Dalby and W. T. Dawson to pay to the said Thomas Dalby, his

executors, &c. out of the said sum of 5000*l.* retained in their hands as aforesaid, whatsoever should be found and declared to be due to the said Thomas Dalby, either by an amicable settlement of the said accounts between the plaintiff and Thomas Dalby, or which should be adjudged to be due in arbitration or umpirage. And it was thereby further covenanted and agreed, that any overplus which should remain in the hands of the said John Dalby and W. T. Dawson, out of the said sum of 5000*l.* retained in their hands as aforesaid, should, after discharging the balance due to the said Thomas Dalby, to be ascertained as aforesaid, be paid to the plaintiff. The deed then contained a covenant by John Dalby and W. T. Dawson, that they would stand possessed of the said sum of 5000*l.* upon the foregoing trusts.

The deeds were executed by all parties, and soon afterwards one of the arbitrators died, and another was appointed in his room, armed with the same powers as his predecessor. These arbitrators appointed Fynes Clynton, Esq. to be their umpire.

Thomas Dalby rendered to the plaintiff an account of his demands within the time limited by the deed of trust; but the plaintiff objected to that account, and it was accordingly referred to arbitration. The arbitrators, however, being unable to agree upon an award, referred the matters in difference to their umpire, Mr. Fynes Clinton, who died before any further proceedings were had in the reference.

In April, 1831, the trustees called in the mortgage money, which the plaintiff being unable to pay, they entered into the receipt of the rents of some portion of the mortgaged premises; the plaintiff, however, was afterwards restored to the receipt of those rents. In August, 1833, the interest being considerably in arrear, the trustees again called in their mortgage money, and threatened to take legal proceedings for its recovery. Upon this, the plain-

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tiff offered to pay them the sum of 7259*l.* 17*s.*, which was the calculated amount of principal, interest, and costs, in respect of the sum of 7000*l.*; and according to the plaintiff's evidence, a legal tender was made to the trustees of that sum. This last fact, however, was denied by the trustees, who swore that the money was only stated to them (a) to be in certain leathern bags, which they saw, but which were not opened before them. The plaintiff, at the same time, gave the trustees a formal notice, that he denied their right to retain the mortgage as a security for any balance alleged to be due to Thomas Dalby; because such balance was to have been ascertained by mutual agreement, or by a reference, which, by the deaths of parties, had now become impossible; but, that he was ready and willing to enter into a fresh agreement of reference.

The trustees having refused to accept the plaintiff's offer, on the grounds that they had received notice from Thomas Dalby to retain the sum of 5000*l.*, parcel of the whole mortgage sum of 12,000*l.*, as a security of his demands against the plaintiff, the latter now brought his bill against Thomas Dalby and the trustees, praying that it might be declared, that the indentures of lease and release, and the declaration of trust, so far as the same were made, or appeared to be made, as a security to Thomas Dalby, were not binding on the plaintiff; and, that the declaration of trust ought to be delivered up to be cancelled; that an account might be taken of the rents and profits of the mortgaged premises received by the trustees since August, 1833, and the amount thereof deducted from the said sum of 7259*l.* 17*s.*, and that, upon payment of the balance by the plaintiff to the trustees, they might be decreed to reconvey, &c.

A cross bill was filed by the defendants, praying that

(a) See post, p. 191.

the trusts of the indenture of trust might be specifically executed.

The bill, in the first suit, contained statements and charges, that, prior to the year 1811, all accounts between the plaintiff and Thomas Dalby had been settled and adjusted, and that all monies which, previously to that time, had become owing from the plaintiff to Thomas Dalby, had been paid and satisfied; that, when the plaintiff's effects were seized under the execution, he was greatly embarrassed in his circumstances, and had no means of satisfying the debt of 7000*l*.; that, under these circumstances, he applied to the defendant, Thomas Dalby, for his assistance, but that the latter purposely delayed procuring for the plaintiff the offer of the loan of 7000*l*. from the other defendants, the trustees, until it had become necessary for the plaintiff to accept such loan in whatever terms the same might be offered; that the terms exacted by Thomas Dalby were, that the accounts of all transactions between the parties since the year 1797, should be unravelled and investigated,—that the balance thereof should be computed—that the advantage of the Statute of Limitations should be waived by the plaintiff—and that the proposed security for 7000*l*. should be extended to secure the balance which should be so found due; that the plaintiff reluctantly consented to accept the loan of 7000*l*. upon these terms; that, under these circumstances, the defendant, Thomas Dalby, influenced the other defendants to offer the said loan upon terms dictated by himself, in execution of an oppressive and unjust design which he had formed, of exacting payment from the plaintiff of a large sum of money for which the plaintiff was not liable; that throughout the negotiation, Thomas Dalby acted as the plaintiff's solicitor, and made the usual charges; that he was precluded by his situation as such solicitor from accepting from the plaintiff any benefit whatsoever, beyond the usual and fair charges for his services; that he never-

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theless took advantage of his situation to exact and obtain from the plaintiff large and unfair advantages in his own favour; that the indentures of lease and release, and declaration of trust, so far as the same were originally extended to be a security to Thomas Dalby, were obtained from the plaintiff by the exercise of undue influence, and were fraudulent, illegal, and not binding on the plaintiff; or, if they had ever been legal and binding, had ceased so to be from the impossibility of carrying the arbitration into effect.

The defendant, Thomas Dalby, by his answer stated, that in the year 1801, he, at the request of the trustees under the will of the plaintiff's father, delivered to them an account of several sums of money which had been advanced by the defendant and his father to the plaintiff; that a copy of this account was delivered to the plaintiff, who requested to have a more detailed account; that, in 1802, a more detailed account was delivered to him; that, in 1811 and 1813, the defendant again delivered accounts to the plaintiff, whereby it appeared that there was a balance of upwards of 2000*l.* due to the defendant; and that the plaintiff made no objection to these accounts at that time, and had ever since retained them in his custody. That, in 1819, a correspondence took place between the plaintiff and the defendant respecting the application of certain monies mentioned in the accounts, when the plaintiff appeared to be perfectly satisfied with the defendant's explanation, and made no objection to the accounts, but, on the contrary, paid to the defendant several sums of money after that period in reduction of the defendant's debt. The defendant then, in answer to the allegation in the bill, denied that in the year 1811, or at any other time, the accounts between him and the plaintiff had been adjusted, save by the delivery of the afore-said accounts, or that the monies due to the defendant on such accounts had been paid, save certain items for which

credit had been given to the plaintiff; on the contrary, he alleged, that on several occasions, both before and after the delivery of such accounts, he had demanded interest of the plaintiff. He admitted, that at the time of the execution against the plaintiff, the latter was much embarrassed, though, as the defendant believed, only temporarily. He also admitted, that after the defendant had failed to induce the execution creditor to give time to the plaintiff, he proposed to procure the loan of 7000*l.* from the other defendants; but he stated, that the plaintiff had, on many former occasions, requested him to procure that loan; and that the possibility and means of procuring it had often been discussed between him and the plaintiff. The defendant denied that he had insisted upon the terms stated in the bill, as a condition for procuring the loan, or that he had ever, in any manner, urged the plaintiff to comply with such terms; but he stated, that in the course of the transactions the plaintiff voluntarily told him that he would settle the accounts in any manner the defendant and his brother, John Dalby, might think fit; and therefore, from such assurance, and from the intimacy which had subsisted between him and the plaintiff, and the plaintiff having frequently promised to settle the accounts, he, the defendant, fully expected he would do so, without availing himself of the technical defence of the Statute of Limitations. The defendant, however, admitted, that although, in the course of the negotiation, he had not insisted upon, or even asked for, a settlement of accounts, yet his brother, the defendant, John Dalby, refused to join in advancing the loan, unless a complete settlement were made of all the transactions in question; and that, upon that understanding, which was acquiesced in by the plaintiff, the deeds were executed. In conclusion, the defendant insisted on the validity of the deeds, alleging that, at the time of their execution, and throughout all the previous transactions, it was and had been the

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intention of the parties, that the benefit of the Statute of Limitations should be waived by the plaintiff; and he submitted, that the plaintiff was bound by the recitals in the deeds to that effect. He submitted also, that the agreement to refer the accounts to arbitration was the principal term in the trust-deed, and the naming arbitrators and an umpire was but an accessory; and that the principal agreement was subsisting and ought to be performed, notwithstanding the death of the umpire.

The defendant, John Dalby, by his separate answer, stated, that he did not believe that Thomas Dalby took advantage of his alleged situation to exact or obtain from the plaintiff large or unfair, or any, advantages in his own favour; for that it was at the particular recommendation and suggestion of him, John Dalby, made from motives of private regard and affection for his brother, Thomas Dalby, and not at the suggestion of Thomas Dalby, that it was made a term of the loan, that the plaintiff should agree finally to settle the accounts then depending between him and Thomas Dalby; and that Thomas Dalby himself was not at all anxious to insist upon such terms, but was willing to have left the settlement of the accounts to the honour of the plaintiff, in whom he had greater confidence than John Dalby himself had.

The joint answer of John Dalby and his co-trustee corroborated the defence made by Thomas Dalby.

The evidence for the plaintiff was to the effect, that at the time of the execution he was in such distressed circumstances as to induce him to accede to almost any terms for the purpose of obtaining a loan; that he had already applied for money on mortgage of his estate, but that the security he had to offer was objected to; that he had no other resource but to obtain the loan of 7000*l.* upon the conditions insisted upon by John Dalby; that he expressed great reluctance to submit to such conditions; and that some of his friends advised him, rather than submit to them.

to allow the sale of his effects to take place; that he could not make up his mind to take that course, and ultimately acceded to the required terms.

The evidence for the defendant, Thomas Dalby, did not differ materially from that of the plaintiff, so far as related to the plaintiff being compelled by distressed circumstances to accept the terms imposed upon him by John Dalby. The witnesses, however, generally acquitted the defendant Thomas Dalby of making the settlement of his own accounts a condition for affording the plaintiff his assistance; and one of them, who was also examined for the plaintiff, stated his belief, that Thomas Dalby honestly exerted himself for the interest of the plaintiff, and would have done, and did, in fact, do all in his power to raise the money, and get the business of the plaintiff settled, without regard to his own claims, relying entirely on the honour and integrity of the plaintiff; but that his brother, John Dalby, interposed, to prevent any arrangement being effected, unless Thomas Dalby's claims were included and settled at the same time.

It appeared in evidence, that the plaintiff had several times verbally admitted that he was indebted to Dalby, though he said it was but to a small amount, and only for professional business.

Sir Charles Wetherell, and *Mr. L. Wigram*, for the plaintiff.—Under the distressing circumstances in which the plaintiff was placed, in consequence of the approaching execution—a sale being advertised of his effects—himself threatened with exposure and expulsion, with attendant inconvenience and soreness of mind—he applied to the defendant, Thomas Dalby, for assistance. In the first instance, Dalby endeavoured to make terms with the judgment-creditor, and so far his conduct was fair. But, upon the failure of those endeavours, and Dalby being in consequence more urgently pressed by his client to raise

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money, he availed himself of the opportunity to say—Notwithstanding the difficulty in which you are placed, I think I have a remedy, and can procure you the 7000*l.* on mortgage; but I must slip in a claim of my own, and you must give me a mortgage for 12,000*l.*; I must make my claim a prefix or affix to the mortgage transaction. The time was short—the patience of the judgment-creditor was gone, and the consummation was shortly to take place. The plaintiff was thus induced to give a security for 12,000*l.* instead of 7000*l.* The sum of 5000*l.* was by these means added to the 7000*l.* really and *bond fide* borrowed. The mortgage security is, *simpliciter*, for 12,000*l.*; but there is a deed of even date in the nature of a declaration of trust, in which John Dalby and W. T. Dawson are trustees for this solicitor. That deed contains a false recital, that it was contemplated that Thomas Dalby should have been a party to the mortgage deed, and should, upon the execution thereof, have been paid the amount of his demand; but that the balance due to him had not been ascertained, and therefore that 5000*l.*, part of the 12,000*l.*, was retained by the trustees for the purpose of paying the balance, when found due. The whole of this statement is false. There is no pretence for saying, that a liquidated debt, due to Thomas Dalby, was intended to be part and parcel of the mortgage debt of 12,000*l.* It was not the meaning of the mortgage deed that 5000*l.* was due to Thomas Dalby, but to be retained by the trustees till the balance was ascertained. That was not the genuine transaction. It is false to say that the sum of 5000*l.* was meant to be an admitted debt, due to Thomas Dalby. The retention of that sum was no other than a condition, without which Dalby would not procure the money. The trustees had no right to join in such a transaction, or to permit the plaintiff to sign the receipt which he did. The whole frame of this security, if it can be called a security, is evidence of an improper transaction. A power of sale

was given to the mortgagee; and though the Statute of Limitations had swallowed up all the plaintiff's demands, every demand, with interest, from the year 1797, was to be ripped up, and the only remedy the plaintiff had was the arbitration. Upon Fynes Clinton's death, however, the whole fabric of these unjust and oppressive instruments fell to the ground. The plaintiff was then advised that he had been wrongly dealt with, and the agreement for arbitration being *functus officio*, he tendered to the trustees the full sum, and the only sum, which is due upon these securities.

The first question is, whether it is consonant to any rule of public policy that a solicitor employed by a gentleman to raise a sum of money, in order to avert almost instant ruin, is to intermix with it a transaction of his own, and to make it a condition of his exertions that his demands are to be identified with, and made part and parcel of, the loan of money which he, as solicitor, procures. It is said (though that is doubtful) that the money could not be obtained elsewhere. That aggravates the case against the solicitor. If the money was not to be procured from any other person but himself, the very fact that he was the only party who could lend it, makes the matter worse. The exigency enhances the oppression. It might make but little difference whether the money was easily or not easily, possibly or not possibly, to be procured from a third person, but the relative situation of these parties as solicitor and client removes all doubt upon the subject. The rules of equity in regard to such a case as this are not capricious and arbitrary, but bottomed upon public morality. But, in addition to those undisputed rules by which all courts of justice are influenced in matters of this nature, it is a general rule of equity, that a solicitor acting for his client in any transaction, cannot in that transaction receive any benefit or gift from his client. In *Walmesly v. Booth* (a),

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where a person gave a bond to his attorney in consideration of services rendered to him while in great difficulty, Lord *Hardwicke* expressed his opinion to be, that the Court ought to pay no regard to such a bond, as it might encourage attorneys, after they have got into the secrets of their clients, to extort from them unreasonable rewards to themselves. The general rule upon this subject is adverted to in many cases: *Bellev v. Russell* (a), *Wood v. Downes* (b), *Wells v. Middleton* (c), *Wright v. Proud* (d), *Montesquieu v. Sandys* (e). The question here is, whether the character of the benefit accruing to the solicitor can make any difference as to the general rule. It is clear that Dalby could not have accepted a gift of money from the plaintiff. Can he then accept a security for a sum of money, with a stipulation that the Statute of Limitations shall not bar his claim? It seems clear that he cannot. If the case be such that upon principle the Court ought to exercise its right of supervision over those transactions, the nature and extent of the benefit received by the solicitor can make no difference: *Lewes v. Morgan* (f). The benefit here is the same as if the client had given the solicitor a charge upon his estates.

The other question is, whether the Court will decree a specific execution of the deed of trust, the special mode of taking the accounts directed by that deed having become impracticable. It is admitted that the security was to be confined to the balance to be found due upon an amicable adjustment or by arbitration. Upon the death of the umpire, however, the arbitration could no longer be carried into effect. Then how can the Court decree the relief prayed by the cross bill, the effect of which is to call upon a Court of Equity to compel the plaintiff to name a new umpire, or else to assume to itself the power, contrary to

(a) 1 Ball. & Beat. 107.

(b) 18 Ves. 127.

(c) 1 Cox, 112.

(d) 13 Ves. 138.

(e) 18 Ves. 302.

(f) 5 Price, 86.

the stipulation of the parties, of delegating to the Master the office of taking the accounts? It is an established rule of the Court, that no bill can be filed to compel parties to go to a reference or to name arbitrators. [*Alderson, B.*—In some cases the Court would direct the account to be taken unless the parties consented to appoint an arbitrator.] It is submitted that the Court would refuse to interfere under any circumstances: *Agar v. Maclew* (a), *Street v. Rigby* (b), *Milnes v. Gery* (c). The mode of settling the debt being a stipulated mode, there is an end of the jurisdiction of a Court of Equity to compel the parties to adopt any other mode. Besides, if the Master takes the account, is he to act upon the principle that no length of time is to bar the demand? Is he to determine whether, upon the construction of these instruments, certain debts are or are not to carry interest? Within what limits is his discretion to be confined? It is not necessary, however, to carry the argument to this length, because, in fact, the subject matter of arbitration was at an end upon the death of the arbitrator, in whose room the new arbitrator was appointed. [*Alderson, B.*—Although the deed might be void on grounds of public policy, you will not contend that it might not be set up by subsequent consent; then the question arises, whether the appointment of the new arbitrator was not a subsequent affirmation of the deed.] That cannot be proved unless it can be shewn that the plaintiff knew of the invalidity of the first deed. [*Alderson, B.*—He was told by one witness that no Court in England would confirm it.] It is clear that he made the new appointment, not for the purpose of confirming the deed, but under the impression that he was bound by the terms of the deed to do so. Confirmation, in order to be available, must have been made by a person fully acquainted

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(a) 2 S. & S. 418.

(b) 6 Ves. 815.

(c) 14 Ves. 400.

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with his rights, and aware that the original transaction was impeachable: *Crowe v. Ballard* (a), *Roche v. O'Brien* (b), *Dunbar v. Trevennick* (c).

Mr. Boteler, and Mr. Bethell, for the defendant, Thomas Dalby.—The transaction which is called so oppressive is the result of an accumulated debt, arising from a number of small advances made by the defendant to the plaintiff at the instance and earnest entreaties of the plaintiff. These advances were made between the years 1797 and 1799. Letters are in evidence, shewing the urgency with which the plaintiff pressed for these loans, some of which were to the very smallest amount, and were wanted to meet the current expences of the day. The language of the letters is such, that to have denied the plaintiff's requests would have been next to impossible. In 1801 an account of these advances was delivered by the defendant to the plaintiff. In 1802 another more particular account was delivered to him at his own request. From 1802 to 1810, nothing remarkable occurred; but the defendant having borrowed many of these monies to accommodate the plaintiff, was obliged to press him for interest, in order to hand it over to the lenders. During that period the defendant was repaid only the most trifling sums. In 1812 a correspondence took place, in which some alleged inaccuracies were explained, to the apparent satisfaction of the plaintiff. In 1810 another correspondence took place upon the same subject, which led to another explanation. From that period the defendant ceased to act generally as the plaintiff's solicitor, the plaintiff employing either Mr. Brock or Mr. Hall. In the present transaction Brock acted as the solicitor both for the plaintiff and the mortgagees, and he charged the procuration money. It is true that the defendant assisted in preparing the deeds, and delivered his

(a) 2 Cox, 253; 3 Bro. C. C.
 117.

(b) 1 Ball & Beat. 339.
 (c) 2 Ball & Beat. 304.

bill of costs for preparing them to Cheslyn. In form, perhaps, the account ought to have been made to John Dalby, and handed over to Cheslyn; but when the situation of the parties is considered, that circumstance is immaterial. The rule as to solicitor and client, which has been so much relied upon, cannot apply to this case. Upon what is that rule founded? On the consideration that the client has no advice. But here he is surrounded by advisers, and the person in whom he places his confidence, and who is not the defendant, is the party who advises him to engage in this transaction as the only means of procuring the money. He is not in the hands of the defendant as his solicitor. He is indeed in the hands of John Dalby, who made the conditions, while his brother would have slept upon his rights; but the whole matter was transacted under the advice of Cheslyn's own solicitor. Even had the plaintiff been forced into making this security, it was only to do a plain act of justice; but the evidence, so far from shewing improper interference in the defendant, shews that he was guided by others, and was himself disposed to trust to the honour of the plaintiff. After all, this is not a security for 5000*l.*, but only for what honourable men would state to be due on taking the account. It is not because a solicitor takes a security from his client, that it will not stand good for what is really due: *Lewes v. Morgan* (a), *Newman v. Payne* (b).

The other point for which the plaintiff contends is, that the Court will not carry into execution this deed of trust, upon the general grounds that it will not execute an agreement to refer to arbitration. The cases however which have been cited on that subject do not apply here. [*Alderson, B.*—The difficulty here is, that this is a deed which requires the settlement of accounts upon certain specific terms, one of which consists in a waiver of those ad-

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(a) 5 Price, 86.

(b) 4 Bro. C. C. 350; 2 Ves. J. 199.

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vantages which the law would give in the ordinary way. If you go out of the ordinary course, must you not take the deed in all its parts, one of which is that you refer the account to A., B., C., and D.? If the Master takes the account he must take it in the usual manner, subject to the Statute of Limitations. The clause in the deed as to waiver of the statute applies only in the case of the account being taken by arbitrators.] The effect of the statute is removed by the recital in the deed that the debt exists. [*Alderson, B.*—There is some difficulty in that, since Lord Tenterden's Act (a). It may be doubted whether the written instrument required by that act should not state the amount of the debt due, as well as that a debt is due. In *Kennett v. Milbank* (b), there was a recital in a deed, as there is here, that a debt existed; and yet the Court held that the debt was barred by the Statute of Limitations. An account may consist of parts, some of which are barred by the statute, and some not. Can a man be bound by an acknowledgment which applies to one part of the account, and not to the other? The question comes to this, whether a debt being admitted to be due, you are not at liberty to apply parol evidence to prove the amount.] The case to which your Lordship refers might apply to a single debt, but not to an account. If this were an account between two mercantile houses, to hold, that such a recital as this would not oust the statute, would be productive of great hardship. The same observation applies to a steward's account. It would be an extraordinary thing to say that the whole account, consisting of many disputed items, was to be barred.

But it is scarcely necessary for the defendants' case that the Court should determine the effect of this recital, because the Court, before it grants the plaintiff the relief which he seeks, may impose upon him the very terms of

(a) 9 Geo. 4, c. 14.

(b) 8 Bing. 38; 1 M. & Scott, 102.

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the deed. The plaintiff relies upon the abstract proposition, that the Court will not compel the performance of an agreement to refer to arbitration. But the circumstances of this case give rise to a different proposition. You have here an agreement to refer, partially executed; and in the course of the performance of that agreement, the further carrying it on *modo et forma* becomes impossible by the death of the arbitrators. The party then comes here, not to carry the agreement into effect, but to avail himself of the accident which has occurred to break it. The proposition is, not to have the agreement executed, but that the party refusing to carry it on shall be relieved from it; and this is attempted to be justified upon principles only applicable when the agreement is to be enforced. It is true that the accident of death has stopped the proceedings under the arbitration, but it is the duty of a court of equity to relieve against such accidents. Can this party, who has it in his power to supply the defect arising from the accident, be allowed to have the benefit of that wrong? A court of equity will say, You may get back the estate as you can, but you who refuse to execute the contract shall have no assistance here. The true inquiry is, if a man give security to abide the event of an arbitration, which he agrees shall proceed, and he revokes the arbitration, shall he get back his security? He is in the position of a man who revokes his submission to arbitration. A man cannot come into a court of equity and say, that established principles are applicable to them who break their agreement. In *Harcourt v. Ramsbottom* (a), where the party who gave security revoked his authority, and then came for an injunction, Lord *Eldon* refused it. He would not interfere at all. In similar circumstances a court of law acts upon the same principles: *Woolley v. Kelly* (b). [*Alderson, B.*—That case does not go the

(a) 1 J. & W. 505.

(b) 1 B. & C. 68; 2 D. & R. 158.

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length for which you contend. Where a verdict is taken subject to the award of an arbitrator as to the amount of the debt, the Court, if necessary, will compel the party to appoint a fresh arbitrator, but not where the verdict is taken subject to arbitration generally.] At all events the universal principle applies, that no man can take advantage of his own wrong. A court of equity will not listen to a man who comes for its assistance, and yet, upon mere technical grounds, refuses to do equity: *Morse v. Merest* (a). The consideration for this deed consisted in part of the settlement of the defendant's account. The plaintiff received the money upon the faith of that consideration; how then can he afterwards object to the settlement? Independently of principles of common honesty, a valuable consideration was given. The deed recites, that the amount of the balance is not yet struck. That is a distinct acknowledgment of the relation of debtor and creditor. The substantial agreement is, that the account shall be paid and there shall be a security for it. The plaintiff's refusal to name an arbitrator cannot deprive this Court of the power of ascertaining what is due to the defendant, and directing the account to be taken in its own way.

Upon the whole, the equity upon which the defendant insists is this: that the Court will not permit the plaintiff to take a reconveyance of the mortgaged premises until he shall have consented to the appointment of a new arbitrator, or until the accounts shall have been settled by the Master: the defendant being allowed in either case the benefit of all the stipulations in the deed. But, supposing the Court should make no immediate declaration as to the latter point, then it is submitted that the defendant ought to have the benefit of insisting upon the deed before the Master; it being open for him to contend, either that the plaintiff has contracted himself out of the Statute of Limita-

(a) 6 Madd. 26.

tions, or that the recital of the deed satisfies Lord Tenterden's Act. *Dickenson v. Hatfield* (a).

In the view which has been taken of the case on behalf of the defendant, it seems unnecessary to argue the question of confirmation.

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Mr. *Metcalf*, for the defendants, the trustees, observed, that the bill prayed relief which materially affected his clients. They were called upon to reconvey the whole estate to the plaintiff, upon payment to them of a certain sum which the plaintiff alleged he had tendered to them, and which they had refused to accept. This involved the question whether the tender made to them was such as rendered it imperative upon them to accept it, and, upon their refusal stopped the payment of interest upon the whole 7000*l.* (b). He thought they ought not to be called on to decide that question. [The Court concurring in this last observation, *Metcalf* proceeded no further with his argument.]

Upon the question of arbitration, the counsel for Thomas Dalby here referred to *Webster v. Bishop* (c), *Whitmel v. Farrel* (d), and Francis's Maxims.

Sir *Charles Wetherell*, in reply.—No case in law or equity has been produced to sanction the proposition laid down in this bill. The question is, whether if A. and B. contract by deed to refer the matters in dispute between them to arbitration, and one dies, it is or not discretionary with a court of equity to compel the parties to name new referees. The practice of the Court gives a negative to that proposition in all its shapes and forms. One rea-

(a) 5 C. & P. 46; 1 Mood. & Rob. 141. v. *Brown*, 1 C. & P. 288. See ante, p. 176.

(b) Co. Litt. 203 a; *Rend v.* (c) Pre. Ch. 223.

Goldring, 2 M. & S. 86; *Alexander* (d) 1 Ves. sen. 256.

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son is, that the Court will not make itself subsidiary or ancillary to a private agreement of that description. Another ground, which is the direct one, is, that although a court of equity will execute that agreement which the parties themselves have made, it will not make a fresh agreement for the parties, by applying to it principles of similitude or analogy. If the Court deviated from this rule, its jurisdiction would be afloat, as it were; and even if this rule were not sustained by analogy to that of courts of law, it would not be an insuperable objection: because it is not always that in matters of practice courts of equity can follow the law; the form of proceedings in the respective courts being different. But here it so happens that the legal rule does support the analogy. If the verdict ascertains the extreme limit to which the damages may go, the parties say they will not trouble the Court with investigating all the items, and the matter is referred to arbitration. If then one of the parties refuse to name an arbitrator, the Court says, You have admitted upon the records of the Court that so much is due, and you shall proceed with the arbitration. But how does that affect the present case? Is there any authority for saying that this deed is a verdict for 5000*l.*? Is it a judicial proceeding? Can it be called matter of record? Even where a verdict has been taken for damages subject to the award of an arbitrator, a court of law will not in doubtful cases enforce the arbitration: *Hall v. Phillips* (a). It is clear, therefore, that the rule of courts of equity is not peculiar to their jurisdiction; and is there any thing in this case so stringent or exigent upon them that they shall begin a new rule? In *Milnes v. Gery*, Sir William Grant said that an agreement, where there is no party to fix the price, is inoperative *quasi nullo pretio statuto*. Here, therefore, there is no operative

(a) M. & Scott, 167; 9 Bing. 89.

agreement; and if the Court drives the parties into the Master's office, it will make a new agreement for them, precisely as if it compelled the party to choose A. as an arbitrator instead of B.: and is it to be contended that the Court could compel that choice, when it is clear from the evidence, that the arbitrators originally named were chosen from motives of private confidence?

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With respect to the declaration of trust, it is argued that the debt being admitted by the deed, the amount of it must be referred, with all the stipulations of the deed, to a new referee. But is this such an absolute admission of the debt as can be laid before another referee? No; there is nothing but a recital that the bills are of a certain age, and that upon an adjudication upon them in the manner stated in the deed, the Statute of Limitations shall not be set up. But there is nothing in the deed to signify that it shall not be set up in any other court. Can you say that this is an admission which is to be received before every tribunal, when the deed recites that the balance to be found due upon the accounts "is to be ascertained and paid in manner hereinafter mentioned?" It is a fallacy, upon every rule of construction, to make this a simple admission of a debt. The plaintiff said—If my arbitrators are named the judges, I will consent that they shall take the account, and the statute shall be waived; but that was the extent of his admission. Can it be contended that under such a special agreement as this the Court may say, Though in other respects the deed falls to the ground, yet we will abstract the admission and give it a universal character; and therefore you must consent not to set up the statute? The case of *Kennell v. Millbank*, as far as it goes, is favourable to the plaintiff; at all events the judges did not there decide that the deed should operate for one purpose and not for another. This deed was most oppressively obtained, and even if it were practicable to refer the accounts to the Master, they must be dealt with

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in the ordinary manner, and without reference to the deed. In cases like the present, all the authorities go to the entire destruction of the instrument. What has been said as to the extent of the solicitor's lien is not applicable to this unfair transaction.

June 28th.

ALDERSON, B.—In these two bills, which are cross bills, the plaintiff Cheslyn seeks to set aside the lien claimed by the defendant Thomas Dalby on the estate mortgaged to the other two defendants, and to have a reconveyance on payment to them of a specific sum deposited (after having been previously tendered to them) in the hands of third persons for their use. On the other hand, the trustees claim to hold the estate until the sum of 7000*l.*, with interest to the present time, shall be paid to them; and further, until the defendant Thomas Dalby's lien in respect of the debt claimed by him is also satisfied. And in the cross bill, Thomas Dalby claims relief, and that the Court shall enforce the arrangement contained in the declaration of trust, dated 22nd April, 1830, either by compelling Cheslyn to nominate an arbitrator, or by referring the account between the parties to the Master on the same terms as the arbitrators originally named were empowered to ascertain the balance.

The question has been very fully and ably discussed, and is to be resolved into two inquiries, of which the first is, Whether the transaction between the plaintiff Cheslyn and the defendant Thomas Dalby was a fair transaction—or whether it was one in which the latter, availing himself of his character of attorney, has obtained, in a case in which he was acting as attorney for Cheslyn, a greater remuneration and advantage for his services in that behalf than his regular and ordinary fees, in which case, on the grounds of public policy, it is contended the transaction ought to be set aside altogether.

There is no doubt that the courts of equity have always

exercised a very jealous superintendence over transactions between attorney and client. In *Wells v. Middleton* (a), Lord *Thurlow* goes very fully into the question, and lays it down broadly, that it is perfectly well known that an attorney cannot take a gift or gratuity whilst the client is in his hands, nor instead of his bill. And in *Walmesley v. Booth* (b), Lord *Hardwicke* lays the same principle down, and confirmed it in *Saunderson v. Glass* (c). Again, Lord *Eldon*, in *Hatch v. Hatch* (d), and Lord *Erskine*, in *Wright v. Proud* (e), agree with this, as being the law even where no fraud is imputable to the attorney. But I do not find it laid down, that where only a security has been given for a debt really due, or for a reasonable reward for services already rendered, the Court will set such security aside. Indeed, in the case of *Walmesley v. Booth*, Lord *Hardwicke* suffered the bond to stand as a security for what was really due, and referred the amount of that proper compensation to the Master.

Upon looking at the facts of this case, I think I am bound to say that I see nothing whatever in them which can in the least fix upon Mr. Thomas Dalby the imputation of any improper conduct: and that is the case even if we take the transaction as really a stipulation made by him, and not by his brother on his behalf. There is some little ambiguity in the evidence as to this; but inasmuch as it was a stipulation only for his benefit, and to which, when his brother made it, he clearly assented—if, indeed, he did not originally suggest it—I think the reasonable mode of viewing the case is to treat it as a stipulation made by him. It seems to me, however, to be well made out that he had *bond fide* claims to a con-

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(a) 1 Cox, 112.

(b) 2 Atk. 27.

(c) 2 Atk. 296.

(d) 9 Ves. 294.

(e) 13 Ves. 138.

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siderable amount upon Mr. Cheslyn, which had long been pending and unsettled; and which had been the subject of much arrangement between the parties. It appears to me highly probable, that a great part of these claims was well founded; and that there was a moral obligation at all events as to a great part, and a legal obligation as to some part of the debt binding upon Mr. Cheslyn at the time when the transaction took place.

I am by no means satisfied that, if we look to the substance of the transaction, and not merely to the form of it, Mr. Dalby can properly be considered as having acted in this business as the attorney for Mr. Cheslyn. It is clear that Mr. Cheslyn was attended and assisted by other persons, his undoubted attornies, and Thomas Dalby appears to me to have acted with them, rather as an agent for Cheslyn the mortgagor in procuring the money, and as the attorney for the trustees, who were the mortgagees lending it. It is true that he has made charges as an attorney in respect of the preparation of the deeds, &c., and that in his bill he names Mr. Cheslyn as his client. But it is no uncommon practice for the expence of such deeds to be charged on the mortgagor by the attorney for the mortgagees—and the mere form of making out the bill to Cheslyn, instead of to the trustees, when it was to be paid in any event by Cheslyn, does not appear to me to be at all conclusive. Looking therefore at all the circumstances of this case, in the absence of fraud, and at all events in the doubt whether Dalby was really the attorney for Cheslyn at this time—the plaintiff having had the presence of other attornies acting for him and on his behalf when this deed was executed, and there being a *bond fide* debt due, for which alone this was to be a security—I am not prepared to say that this case falls within those general principles so well laid down in the authorities to which I have referred, and to which I give my most cordial assent. Perhaps, indeed, in the view I take of

this case, after the events which have since occurred, it is not absolutely necessary for me to decide that point.

Supposing that the transaction is unimpeachable on the first ground taken by the plaintiff, the question next arises—what is now to be done between the parties? Here, the arbitration originally agreed on has by the death of the arbitrator and umpire been wholly frustrated. And the question arises whether the Court can now enforce the specific performance of the agreement in the declaration of trust, by compelling Cheslyn to name a fresh referee, or, in case of his refusal, by referring the account to the Master: and if so, upon what terms must this be done? Here, the plaintiff Cheslyn comes into Equity to ask relief, and before he can obtain that relief, he must of course perform what the Court shall deem to be equitable, that is to say, the substance of his agreement. Now, what is that? There is a recital that the plaintiff Cheslyn was, upon an account commencing in 1797, and continued down to the time of the agreement, indebted to Thomas Dalby, but that the balance was not ascertained. It is first provided, that to the extent of 5000*l.*, there should be a lien on the estates mortgaged for that balance when ascertained. And then the deed goes on to provide for a special mode of ascertaining that balance. If the parties cannot agree on it, it is to be ascertained by arbitration. Two persons are named to be the referees, with power to name an umpire: and there is then a special clause, that in taking the accounts, such arbitrators and umpire are not to allow the claim to be defeated by the Statute of Limitations.

Now, I think this agreement is composed of two distinct parts:—1st, It is admitted that there is some balance due to Thomas Dalby; and it is agreed that the estate is to be subject to a lien for that balance. But, 2ndly, there is also an agreement as to a specific mode of ascertaining that balance in case of dispute. Now, the latter alone has

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failed, by events over which the parties had no controul. But it seems to me, that notwithstanding this, the former part remains entire, and if Mr. Cheslyn has admitted that there is a balance due, and has by a deed, executed under such circumstances as that it ought to be enforced, agreed that his estate shall be subject to a lien for that balance, why am I to decree a reconveyance of the estate without compelling him to fulfil that part of his agreement? It appears to me that I ought not to do so—and that in this case I ought to declare that such lien exists.

But according to this view of the case, the special mode of ascertaining the balance has failed; and the Master therefore, in taking the account, ought to allow to Mr. Cheslyn the benefit of the Statute of Limitations, and all other defences which could legally have been made by him at the date when the declaration of trust was executed. For the proper mode, as it seems to me, of construing Mr. Cheslyn's stipulation, is to take the whole clauses as to the arbitration together. If the balance had been settled in the way proposed, and by the individuals named, it might be in his judgment reasonable to give a greater latitude to the discretion of his selected judges. But it would not be in accordance with this to give the same power to the Master as to other persons not in the same situation. That bargain alone which the Court clearly sees that he has made, ought to be enforced. But it is not clear to me that this was more than an absolute agreement that the estate should be bound for the true balance, with a conditional waiver of the defence of the Statute of Limitations, in case the balance was determined by selected judges.

Upon the whole, then, in the first case of *Cheslyn v. Dalby*, I propose to decree that the account should be referred to the Master—that he should take the account, and ascertain the balance on the 22nd April, 1830, allowing all defences that could have been made by Mr. Cheslyn

at that date; and that, having ascertained such balance, he should allow interest thereon from that date to the present time, and that on payment of 7000*l.* and interest to the trustees, and also this ascertained balance with interest to Mr. Thomas Dalby, the trustees should be directed to reconvey the estates to Mr. Cheslyn.

I shall reserve the question of costs as to Mr. Thomas Dalby, till the report has been made.

It seems to me that the trustees ought to have their costs.

The cross bill I think should be dismissed, and with costs.

Decree accordingly.

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On this day the cause was spoken to on the minutes.

Nov. 24*th*.

ALDERSON, B.—I have considered the point respecting the Statute of Limitations. It appears to me that the defendant, Thomas Dalby, ought not to be precluded from contending before the Court that he is not barred by the statute; though I do not think he will ultimately succeed in that argument. I think that the deed which speaks of the balance being due cannot be coupled with parol evidence of the amount of the balance; yet there are two authorities in which the question has arisen. In *Dixon v. Deveridge* (a), Lord Tenterden thought that a parol admission of a balance being due, coupled with parol evidence of the amount of the balance, would take the case out of the statute. Now, as the same learned judge says in *Dickenson v. Hatfield* (b), that the object of the statute was to procure that in writing for which words were previously sufficient, it may be contended that a written admission may now be coupled with parol evidence as to the amount, in the same way as a parol admission was coupled with parol

(a) 2 C. & P. 109.

(b) 5 C. & P. 46.

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evidence before the statute. I shall therefore leave it for the Court to say, on a future occasion, whether the deed in question, coupled with the evidence, has the effect of placing this case within the range of such cases as *Dixon v. Deveridge*.

Therefore let the Master find the amount of what was due to the defendant, Thomas Dalby, within six years before the execution of the deed, and also find what was due before that time: the plaintiff on the one hand not to be precluded from the benefit of proof of payment or of satisfaction to be inferred by the Master from length of time; and the defendant on the other hand not to be precluded from setting up the deed as an answer to the Statute of Limitations.

June 28th,
29th.

In 1780 the interest of a sum of money was bequeathed to A. for her life, and after her decease the principal to her daughter B. Between 1784 and 1795 proceedings in Chancery, in which A. and B. were parties, were instituted against the executor, and a decree for an account was obtained, which was not acted upon. From

that time till 1828, no application was made by B. for her legacy, nor did it appear that A. had of late years received her interest. On the other hand, it was stated by the representatives of the executor, and from circumstances it appeared probable, that the legacy was paid by the executor many years ago to A. and B. jointly, or to one of them with the consent of the other:—*Held*, nevertheless, that payment of the legacy in the mode suggested could not be presumed, such mode of payment being contrary to the presumed duty of an executor:—*Held*, also, that A. not dying till 1830, B.'s claim was not barred by the Statute of Limitations.

A residue bequeathed by will is clearly within the provisions of the stat. 3 & 4 Will. 4, c. 37, s. 40.

PRIOR v. HORNIBLOW.

SARAH FREEMAN TAWNEY, by her will dated the 19th July, 1780, gave and bequeathed to her brother, James Horniblow, certain leasehold estates, upon trust to pay the rents and profits thereof to her daughter, Elizabeth Barnes, for her separate use for life, and after the death of the said Elizabeth Barnes, upon certain trusts for the benefit of the testatrix's grand-children, Samuel Barnes and the plaintiff, who were the children of Elizabeth Barnes; and after giving certain legacies, the testatrix gave and bequeathed to the said James Horniblow, his executors and administrators, the sum of 300*l.* upon trust, to place the same out at interest, and pay the interest unto her said daughter, for her separate use; and after the

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death of her said daughter to pay and apply the interest of the said sum of 300*l.* as a further help and assistance towards the support and bringing up of her said grand-children, Samuel Barnes and the plaintiff, until their respective ages of twenty-one years; and the testatrix thereby gave to her said grand-children the said sum of 300*l.*, to be paid them as they should respectively attain such ages, in equal shares and proportions; but in case her said daughter should survive her husband, then the testatrix gave and bequeathed to her the sum of 100*l.* part of the said sum of 300*l.*, to be paid to her as soon as conveniently might be after her said husband's decease; and after giving certain specific bequests, the testatrix gave all the residue of her personal estate to her said grand-children, to be equally divided between them, when they should attain the age of twenty-one years; and she appointed James Horniblow her executor.

The testatrix died in August, 1780, leaving the several persons named in her will surviving her. James Horniblow proved her will, and died in 1791, leaving W. T. Horniblow his executor; and W. T. Horniblow died in 1828, leaving the defendants his executors. Samuel Barnes attained his age of twenty-one, and died in the year 1802 intestate, and without having been married, and letters of administration of his personal effects were granted to the plaintiff. Elizabeth Barnes died in January, 1830, having survived her husband, Thomas Barnes.

Upon the death of Thomas Barnes, James Horniblow, the executor, paid to the use of Elizabeth Barnes the sum of 100*l.*, part of the before-mentioned sum of 300*l.*, pursuant to the directions of the will: but the present bill, which was filed in June, 1835, charged that neither James Horniblow nor his representatives ever paid more than the above sum of 100*l.*, or ever duly accounted for the residue of the estate of the testatrix; and it prayed the usual

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accounts, and payment of what might be found due to the plaintiff on taking those accounts.

The bill contained a charge, which was not supported by any evidence, that the interest on 200*l.*, being the remainder of the legacy of 300*l.*, after payment of the above sum of 100*l.*, was paid to Elizabeth Barnes by James Horniblow and his representatives to the time of her death. The bill also charged that in the year 1784, some disputes having arisen between Elizabeth Barnes and James Horniblow concerning the estate of the testatrix, those disputes were referred to arbitration, and that it was awarded and declared that James Horniblow had in his hands the sum of 292*l.* 12*s.*, part of the said sum of 300*l.*; and that he should proceed to get in the outstanding personal estate of the testatrix, and invest the same upon the trusts of the bill. The bill also charged admissions both by James Horniblow and W. T. Horniblow, that they were respectively accountable for the said sum of 292*l.* 12*s.*

The defendants by their answer stated, that they had been informed by their solicitors that the latter had certain papers in their custody, which were very voluminous, and which had not been read by the defendants, whereby it appeared that in consequence of disputes between the parties, a bill had been filed in 1784 by the plaintiff's family, including herself, who was then an infant, against James Horniblow in relation to the will of the testatrix; that that suit terminated in the arbitration and award stated in the bill; that it did not appear, however, that that award was ever acted upon, for that the bill was afterwards amended, and in 1792 was revived; and that in November, 1795, a decree was made for an account of the personal estate of the testatrix come to the hands of James Horniblow, with a reservation of further directions. The defendants then stated that it did not appear that the decree was ever drawn up, but that all the matters of the

suit were referred to the final award of Benjamin Johnson, Esq., barrister, who awarded 206*l.* 18*s.*, as the total sum due from the estate of James Horniblow to the plaintiff. The defendants then expressed their belief that the plaintiff and her brother had long before that period attained their full age, and "that on or about the year 1803, with the consent of all parties interested, the said sum of 206*l.* 18*s.* was paid to the said Elizabeth Barnes, Samuel Barnes, and the said plaintiff, or to some or one of them, with the privity of the rest of them; and that from that time none of those parties had any claims or rights against James Horniblow or his estates or representatives." The defendants then alleged, that from the year 1803 till the month of October, 1828, when the plaintiff sent a letter to the defendant on the subject, no dealings had ever taken place between the plaintiff and her family, on the one part, and Horniblow or his representatives on the other, relative to the matters in question. They submitted that after the lapse of so many years, all claim of the plaintiff under the will of the testatrix must be presumed to be satisfied; they insisted that the laches of the plaintiff was a bar to any relief in a Court of Equity, and they claimed the benefit of the Statute of Limitations.

The letter of October, 1828, referred to in the answer, was written and sent by the plaintiff apparently without the knowledge of her mother, Elizabeth Barnes, who was then living. It was followed by a letter from the plaintiff's attorney, stating the plaintiff's claim, from the language of which it was to be inferred that Elizabeth Barnes was dead. With respect to the award which the defendants alleged to have been made by Johnson, there was reason upon the whole evidence to conjecture that their statement was correct, but they failed in their proof of it, from inability to produce the deed of reference or arbitration bond.

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Mr. *Simpkinson* and Mr. *Teed*, for the plaintiff.—The defence is, that the plaintiff's claim is barred by the Statute of Limitations (a). That cannot be the case, at all events, as regards the sum of 200*l.*; because, in order to bar a legacy of that description, the statute must have run twenty years after the right to receive payment has accrued. Here the right of payment did not accrue till the death of Elizabeth Barnes, the tenant for life, in January, 1830. As to the residue, it may be questioned whether it is within the meaning of the statute. The statute does not in terms comprehend the residue; the reason for which seems to be, that the 40th section of the statute only applies to liquidated sums. A residue requires accounts to be taken and other proceedings to be had before it can be ascertained; and supposing it to have been ascertained and agreed upon between the parties, it is probable that the words of that section would apply; but here there is no evidence of an account being taken, or any settlement having taken place. The utmost extent to which the defendant could go in proving a balance would be the proof of Johnson's award; but in that they fail altogether.

Supposing the plaintiff's claim not to be barred by the statute; the question is, whether it is affected by the law as it stood previously? Cases occurred before the statute, in which it was discussed whether certain legacies could fairly be presumed to have been settled after the lapse of twenty years. A point of that nature came before Lord Brougham, in *Campbell v. Graham* (b), in which his lordship's judgment, reversing that of Sir John Leach, was affirmed in the House of Lords. His lordship held, that where there are no circumstances to rebut that presumption, it would be in favour of the legacy being satisfied; and, in the case before him, he thought the presumption was not rebutted. The present is directly the reverse of

(a) 3 & 4 Will. 4, c. 29.

(b) 1 Russ. & M. 453.

that case. Can there be any circumstances stronger than there are here, with reference to such a presumption? The same parties who were entitled to the residue, were entitled to the legacy of 200*l*. That has never been paid to them, or invested for their benefit. If so, it follows almost of course that the residue never was accounted for.

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Mr. *Temple* and Mr. *J. Russell*, for the defendants, were directed by the Court to confine themselves to the question as to the 200*l*.—The adjudication of this matter in 1795, disposes of the present suit. The Court then, at the suit of the same plaintiff, and between parties representing the same interests, made the same decree as is now sought for. Since that time the plaintiff has taken no steps to enforce her rights. Parties who lie by for thirty or forty years have no right to expect strict evidence to rebut their claims. [*Alderson*, B.—If you could shew that the legacy was payable thirty years ago, there would be much in your argument. But you do not shew that the legacy was payable till 1830.] There was an arrangement in 1803 or 1804, which completely established the right of all parties. The plaintiff was of age, and might have enforced the award as much as the tenant for life might have done, and had a greater interest in so doing. Yet it is an undisputed fact, that no claim was ever made by her till 1828. She had an immediate interest in a sum which, in her circumstances, was considerable; she had also the benefit of an impending suit, and yet not one step was taken by her for the space of thirty years. At the end of that period, the plaintiff makes a claim by letter; at the same time suggesting what she must have known to be false—namely, that her mother was dead. Upon the whole, there is sufficient evidence from which to presume that the whole claim as to the legacy was discharged in 1803 or 1804. The plaintiff was a party to the former suit. In

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the decree in that suit, there would have been a direction for payment to the mother during her life, with liberty to the plaintiff to apply. She had a present immediate right to call upon the executor to have the money invested. That is clear also from the award. [*Alderson*, B.—You have not got the award. Besides, suppose it to have been awarded that the money ought to have been invested and paid to certain parties—what right have you to say that the party paid was the present plaintiff?] If she duly enforced her rights in that proceeding, the sum would have been secured to her. Though her enjoyment was future, her right to relief was immediate. In *Jones v. Turberville* (a), there were strong circumstances to rebut the presumption of payment of a legacy, yet payment was presumed.

Mr. *Simpkinson*, in reply.

ALDERSON, B.—It seems to me that the case presents no difficulty as to the question of residue. It is clear that residuary property is within the act, and I think also within the known rules relating to present right of payment; because the party had an opportunity, as far back as the year 1800, or soon afterwards, of ascertaining what was the clear residue, and requiring payment of the amount. The act says, that all suits for legacies must be instituted within 20 years next after a present right to receive the same shall have accrued to the party capable of giving a release for the same. Here the present right to receive the residue accrued thirty years ago; at all events, it is not contended that any suit was necessary to ascertain it. The plaintiff's claim therefore is barred as to the residue. The legacy of 200*l.* stands on a different foundation, and I will look into the cases upon that subject. My present impression is, that with respect to that, the party is entitled to an account.

(a) 2 Ves. 11.

ALDERSON, B.—I have considered the question as to the legacy of 200*l*, and I have come to the conclusion that upon that point I ought to make a decree for the plaintiff. It is clear that as there was no present right in the plaintiff to receive that money before the year 1830, when the mother of Mrs. Prior died, there can be no ground for considering the plaintiff's claim in that respect as within the 40th section of the act. It is said, however, on behalf of the defendants, that I ought to presume payment of the legacy in question; and the ground on which that opinion is sought to be supported principally consists of a proceeding so long back as 1795, when a previous suit not having succeeded, and recourse having been then had to a reference which was not acted upon, the parties were advised to institute a fresh suit for securing the benefit of the will to Mrs. Prior and her two children. There was a decree in that suit, and the parties to that decree might have acted under it for the purpose of causing the money in the hands of the then executor to be paid into court, so as to be put out to interest, the interest being paid to the mother for her life; and her two children after the expiration of her life interest receiving the 200*l*. From that time, however, to the present, there is an absence of all legitimate evidence on the subject. What presumption then can be drawn from the apparent acquiescence of the parties since the year 1795? From the mere lapse of time the only presumption that can be drawn is this—that what ought to have been done at the commencement of the period has been done at the end. But no other conclusion can be drawn than that. The defendants insist that payment of this legacy may be presumed; but you cannot draw that presumption from mere length of time, because such payment is out of the ordinary course of transactions. When the parties came of age in 1801 or 1802, it was open to them to make an arrangement with the executor which might be contrary to the presumed duty of the latter as executor.

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They might have said—pay us now what we are entitled to in futuro—we are competent to give you a release. That, however, is not to be presumed, but proved. It must be presumed, not that the executor has not followed the ordinary course of his duty, but the contrary. Here, if the legacy in question was paid by the executor, it was not paid in the regular course of his duty—because it could not be so paid till 1830. If what is suggested has been really done or might be supposed from the documents to have been done, and the executor has done it without taking proper proof of it, he has nobody but himself to blame. The decree as to the 200*l.* must be for the plaintiff.

Decree accordingly.

June 18th.

FISHER v. ARLETT.

Where occupiers file a bill against a party to establish a modus, pending a suit instituted against them by the same party for the tithes, it is not necessary for them, in support of their bill, to have the defendant's admission of their occupation.

A BILL had been filed against the plaintiffs in this suit for an account and satisfaction of tithes for lands which were in their occupation in April, 1826. To that bill the defendants pleaded various moduses, and eight years afterwards filed the present bill to establish those moduses. The defendant, the plaintiff in the former bill, not having by his answer either admitted or denied the occupation of Harrison, one of the present plaintiffs, an exception was taken to his answer on that ground.

Mr. *Walker*, for the exception, contended that there must be an admission of occupation by Harrison subsequent to April, 1826; otherwise, Harrison would have no title to sue. A stranger cannot sue jointly with parties entitled: *Makepeace v. Haythorne* (a). If the other parties die, there is no admission authorizing Harrison to carry on the suit.

(a) 4 Russ. 244.

Mr. Duckworth, *contra*, said that as this was a cross bill, there was nothing in the objection; and he cited *Mitf. Pl.* 81, 82.

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Mr. Walker, in reply, contended that Lord *Redesdale* only referred to the case where the original and cross suit came on together for hearing: here it was uncertain whether the plaintiff in the original suit would ever bring it to a hearing.

PER CURIAM.—It must be considered as a cross suit.

Exception overruled.

HUMBERSTONE *v.* CHASE.

June 11th.

SARAH GAUTHORPE, by her will, dated in August, 1818, bequeathed 2200*l.* 5*l.* per cent. annuities, standing in her name, in the following manner; namely, the dividends of 600*l.*, part of that stock, to William Chase and Elizabeth his wife, for their joint lives, and the life of the survivor of them; and after their deaths the principal to such of their children as should attain the age of twenty-one, or marry; if none should attain that age or marry, the principal to sink into the residue. And the testatrix declared, that in case William Chase should incur his

S. made a specific bequest of the dividends of certain stock to W. and his wife for their lives; the principal, after the decease of the survivor of them, to go to such of their children as should attain 21; and, in default of such children, to sink into the residue. Upon the death of the testatrix,

the various bequests of the will were appropriated to the respective legatees, and W. regularly received his dividends, the principal stock still standing in the name of the testatrix. Afterwards, the wife of W. died, leaving one child by W. In consequence of this event, the executrix of S., colluding with W. and other interested parties, applied to the Bank of England to have part of the stock transferred to the residuary legatee, upon the representation that there was no child of W. The Bank consented to the transfer, but took a bond of indemnity, containing recitals from which it appeared that they had notice of the will, and of the appropriation of the legacies. The stock in question was transferred to the residuary legatee, and ultimately sold out:—*Held*, that the Bank were not liable for the misapplication of the stock.

The Bank stands in relation to stock as a depositary of goods in relation to the goods. The Bank, therefore, can only be made responsible for a transfer of stock after distinct notice given to them of an existing claim upon the stock.

Although the Bank are bound to allow the transfer to or by the executor of stock specifically bequeathed, if the executor has not assented to the legacy, yet it does not follow that, if he has assented to the legacy, the Bank are bound to transfer it to the legatee.

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share of the dividends, his life interest should become forfeited, and go to his children; and in default of such children, should sink into the residue. The testatrix then bequeathed 400*l.*, other part of the above-mentioned stock, to George Henry Chase, to be paid to him at his age of twenty-one years; in default of his attaining that age, such stock to sink into the residue. She then bequeathed the dividends of 1200*l.*, being the remainder of the above-mentioned stock, to Margaret Chase for her life, and after her death, in equal moieties to Sarah Hole and Margaret Humberstone, the two daughters of Margaret Chase, for their respective lives; after their deaths the principal to go to such of their children respectively as should attain twenty-one or marry; and in default of children attaining that age or marrying, to sink into the residue. The testatrix bequeathed the residue of her property to Sarah Hole and Margaret Humberstone in equal moieties, and appointed Margaret Chase her executrix.

The testatrix died in 1819, and Margaret Chase proved the will, but the stock, with the exception of such parts as were sold out, remained, during the life of Margaret Chase, in the name of the testatrix. Margaret Chase finding the property of the deceased, independently of the stock, to be insufficient for the payment of the debts and funeral expenses, sold out stock to the amount of about 200*l.*, which occasioned a proportionate reduction of the several legacies. Some time between this period and the transaction about to be mentioned, Elizabeth, the wife of William Chase, died, leaving her husband and one child of their marriage, Margaret Ellen Chase, surviving her.

In October, 1828, application was made to the Bank to permit the transfer of a moiety of the stock from which William Chase received his dividends. The parties to this application were Margaret Chase, William Chase, Sarah Hole, and John Hole, the husband of Sarah Hole. Upon this occasion it was represented to the Bank, that

William and Elizabeth Chase were entitled to the dividends of this stock for their lives, and that upon their death, without leaving issue, one moiety of the principal would go to Sarah Hole as part of the residue; that Elizabeth Chase had died without leaving issue; that, therefore, William Chase became entitled to the dividends until forfeiture; and that, consequently, subject to his interest, Sarah Hole was entitled to a moiety of the principal.

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In consequence of this representation, the Bank permitted the transfer, and one moiety of the stock in question was accordingly transferred from the name of the testatrix into that of Sarah Hole, who afterwards sold out that stock. The Bank, however, made it a condition of such transfer, that the parties applying should execute a bond of indemnity, for the purpose of saving the Bank harmless, in case it should ever appear that the stock had been improperly transferred. Those parties, and others as their sureties, accordingly executed a bond of that nature, which, in addition to the circumstances immediately calling for its execution, recited the will, the reduction of the legacies by the sale of stock for raising the 200*l.*, and the subsequent receipt of dividends by William Chase.

Margaret Chase died in 1829, and Sarah Hole took out letters of administration of the personal estate of the testatrix, and obtained a transfer of the whole of the stock comprised in the will in her own name. The personal representative of Margaret Chase was not before the Court.

A decree having been made in this suit, without reference to the transaction with the Bank, and upon the supposition that the personal estate of the testatrix consisted of other property besides the above-mentioned stock, the parties aggrieved filed their supplemental bill, and presented their petition of rehearing, for the purpose of having the decree rectified so as to secure to them their rights

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under the will; and the principal question upon the hearing of this bill and petition was, whether, in the event of the stock which had been improperly sold out not being otherwise replaced, the Bank was liable to replace it.

Mr. *Temple*, and Mr. *Kenyon Parker*, for the petition.— No doubt the petitioners are entitled to a decree against Sarah Hole; but as the state of her circumstances renders that proceeding useless, the question is, whether the Bank is liable. If the form of the bond were such that the petitioners could get liberty to sue in the Bank's name, they would not ask to sue the Bank, because then they would go against the sureties. But this is only an undertaking to indemnify the Bank for any money they may actually pay. It will be said, that it was an unnecessary proceeding on the part of the Bank to take the indemnity; that it was only waste paper; that the executrix had a right to sell the stock; and that, on the authority of *Franklin v. Bank of England* (a), the Bank could not prevent the sale. That case, however, does not decide that the executor has a general right to transfer stock into his own name, but only when he had not assented to the legacies. In that case there was no evidence of assent. Here, the bond is evidence both of the assent of the executrix, and that the Bank had notice of it; for it recites the will, and that the legacies had been reduced, and that William Chase had received his dividends: which could only have been by assent of the executrix.

But, independently of the question of assent, the Bank have taken upon themselves the management of the stock. If the deed had been merely improper, however wrong the executrix was, the Bank might have stood clear. But here they rely upon a deed containing a false recital, and have altogether so mixed themselves up in the transaction,

(a) 9 B. & C. 156; 4 M. & R. 11.

as to be concluded from saying that they are not responsible for the misapplication of this fund. Having gone out of their way to join in this transaction, with a full knowledge of its impropriety and irregularity, they have no right to complain of any hardship in being compelled to make good the deficiency. Besides, in the first instance, they will only be put to the trouble of putting the bond in suit against the sureties; though, if the sureties are insolvent, the Bank must pay. The circumstance, that the personal representative of Margaret Chase is not before the Court, is immaterial. This is not a case in which the Court will compel us to take out administration; besides, when several trustees are involved in one common breach of trust, a *cestui que trust*, suffering from that breach, and not being party to it, may proceed against all or any of the trustees; *Walker v. Symonds* (a). [The *Lord Chief Baron*.—Is the Bank in this case a trustee? or is there any case which goes the length of deciding that a trustee, acting *bond fide*, shall be answerable for the acts of his co-trustee? No doubt, any one of several parties who are implicated in a joint breach of trust, may be made answerable for the default of the others, though the others are not before the Court. Another rule is, that where trust money is in the hands of a person who has notice of a claim upon it, if he parts with it he may be made liable for the breach of trust. But you cannot say that the Bank had notice that there was a party who had a claim upon this fund. If the Bank had been informed there was such a party, it might have been otherwise.] The Bank had not notice of the existence of the individual, but they had notice that the money was not payable while there was a child. Therefore they paid it out at their own peril, without ascertaining whether there was a child or not.

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(a) 3 Swanst. 75; see 1 M. & K. 75.

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Mr. *Phillimore*, for the Bank.—The person who committed the breach of trust in this case, was the executrix. She was the proper party to transfer the stock. The Bank was not bound to make any inquiries on the subject, and are not answerable for her acts. She or her representative ought to have been made a party to this suit; for the Bank had a right to resort to the executrix as well as to the sureties. Was there any appropriation of this stock? If there was, the plaintiff has no interest. If there was not, the Bank could not prevent the executrix from selling. The bond can make no difference. [The *Lord Chief Baron*.—The plaintiff uses the bond as notice]. Admitting it to be so, the Bank is not bound to take cognizance of the trust. The case of *Franklin v. Bank of England* decides, that unless there be an assent by the executor, the Bank cannot refuse the transfer; but it does not therefore follow, that if there be an assent, the Bank is bound to transfer to the legatee.

Mr. *Girdlestone*, for other parties.

Mr. *Temple*, in reply.

The LORD CHIEF BARON.—I am of opinion that upon neither of the grounds that have been urged is the Bank liable. I think, upon the grounds taken by Mr. *Phillimore*, no decree can be had against the Bank. The case where there are several trustees, and one is made answerable for the acts of the others, is not analogous to this. If the Bank are trustees, they are not joint trustees with other persons; although in some cases they have been called trustees, as having had notice of a trust. They are not, however, essentially trustees. If it were so, courts of law would be called upon to take notice of trustees. The word, as applied to them, is only used to express a sort of analogy; courts of equity calling a party a trustee under

circumstances arising out of his own conduct. In such a sense a party may be a trustee in many different ways ; but that consideration does not arise here as applied to the Bank. Here the party who committed the wrong was the executrix, and I am inclined to say her representative ought to appear, and be a party to the suit, on the ground that all the persons ought to be made parties who are primarily liable.

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But, passing that by, let us meet the subject upon the main ground. Upon that, I am strongly of opinion that the Bank is not liable. The Bank does not profess to hold money in trust for any body. There is nothing in their act or charter constituting them trustees for that purpose. If the Bank voluntarily enters in its own books a trustee's account, it may, under certain circumstances, become liable for the obligation of those trusts. But the Bank is merely a public servant, and is generally under the obligation to transfer the fund to the person in whom it is vested. Therefore, unless the Bank choose to involve themselves in any transaction, there is nothing to implicate them. The only way in which they can be affected is, by giving them distinct notice of a liability to which the stock is made subject. That happens by a proceeding from this Court or the Court of Chancery, where you have a sort of lien placed upon the stock, so as to prevent the transfer of it. Now that might operate to the prejudice of the Bank, if they set themselves in opposition to such a proceeding, but still they would not be trustees on that account. Then here, the Bank having been informed that there was no trust, nevertheless thought proper to take a bond of indemnity ; but how does that make them trustees ? It is argued that in the present case the Bank took upon itself the trust, in not ascertaining that there were no children entitled to share the fund in question. But that argument carries one a very great length. If you say there may be a possibility of the existence of a

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person entitled to the fund, and that the Bank is bound to ascertain the negative, it will follow that the Bank is in no case justified in allowing the executor to transfer any thing. Unless it had notice of every thing being clear, which can only be by decree of the Court, it could not act. The consequence would be, that you could never transfer any thing till a suit was instituted in a court of equity to administer the estate, or it could be shewn that the executor had advertised for the several parties claiming to be entitled, to come in and prove their claims. Where is the difference between that case and this? Here the notice is, not that the stock is liable to a certain trust, but that the trust is at an end. Is the Bank then to be responsible if that notice turns out fallacious? If the Bank is liable at all, it is only, as in the case of any other depositary, from notice that the person in whose name it stands was not the real owner. Thus, in the case of a wharfinger, if he had notice that A. B. had obtained certain goods by fraud, and after such notice he shipped those goods, the owner might bring trover for them against the wharfinger; and it is a common question at *Nisi Prius* whether the wharfinger had not notice, and whether he was not therefore bound by the consequences. So in the case of a sale of shares in the London Dock, and notice given by the vendor or other party interested, not to transfer the shares, the Dock Company are answerable, if after that notice they make the transfer. This is the utmost length to which you could press the Bank. They had, in this case, no notice of a specific trust, but just the contrary—that there was no trust. I do not think the bond makes any difference. It amounts only to a notice that there was a trust, and that the trust is at an end. I think, therefore, on these grounds, that the bill must be dismissed as to the Bank.

Decree accordingly.

Plagen & Anderson v. 15 Jan. 184. case of the plaintiff changing his abode after bill filed.

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CALVERT v. DAY.

June 17th.

THIS was a motion on the part of two of the defendants, that the plaintiffs, or one of them, might give security for costs; or that the bill might stand dismissed. The plaintiff, J. Calvert, had described himself in the bill as of Cross-street, Canal Basin, City-road, yeoman, whereas it appeared that he lived, when at home, at Gibraltar-street, Liverpool, but that being a hawker and pedlar he had no fixed place of abode. The defendants, who made this motion, and who resided at Kingston-upon-Hull, had obtained two orders for time to answer, namely, on the 7th of April and the 21st of May; but they did not receive information of the misdescription of the plaintiff till the latter end of May. On the 31st of that month inquiries were made at Cross-street, and it was satisfactorily ascertained that no person answering to the description of the plaintiff had been known to live there.

A plaintiff who gives a false description in the bill of his place of residence, will be made to give security for costs, although, from the nature of his trade, he has no residence.

Mr. *Dixon*, in support of the motion, cited *Fowler's Practice* (a), *Sandys v. Long* (b), *Mason v. Polhill* (c), *Meliorucchy v. Meliorucchy* (d), and *Oliva v. Johnson* (e). And he observed, that the party being a hawker and pedlar was in itself a sufficient reason for ordering him to give security for costs.

Mr. *Tamlyn*, contra, contended that the application came too late, and cited *Adams v. Brown* (f), and *Anon.* (g). It is not the practice to require security for costs for a false description, except under very strong circumstances. Here it was impossible to give a true de-

(a) 2 Fowl. Pr. 311.

(e) 5 B. & A. 908.

(b) 2 M. & K. 487.

(f) 9 Bing. 81.

(c) 1 Crompt. & Mees. 620.

(g) 10 Ves. 287.

(d) 2 Ves. sen. 24.

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scription, because it was impossible to state what was the residence of the party. Besides, the motion is irregular in form. An order cannot be made in the alternative; either that security may be given, or the bill dismissed.

The LORD CHIEF BARON, after observing on the difference of practice in courts of equity and courts of law upon this point, said: It appears clearly that there is a misdescription of this plaintiff's residence, and the only reason given for it is, that he had no residence. But if an attorney get a hawker and pedlar to be made plaintiff, he ought to give security for costs. The motion, however, cannot be strictly complied with, for there is no reason to ask for the dismissal of the bill. All I can do is to stay proceedings till security for costs be found.

Order accordingly.

Nov. 10th.

CULVERHOUSE v. ALEXANDER.

The bill charged that the defendants had given no consideration for a certain bill of exchange, of which they were the holders, but that they were mere trustees of it for the plaintiffs; and so it would appear if the defendants would discover and set forth the circumstances under which, and the consideration for which, the bill was endorsed to them. The defendants answered the particular charges as to the circumstances, consideration, &c., but omitted to answer the general charge as to their being trustees:—*Held*, that the answer was insufficient.

THE bill alleged that, in April 1835, the plaintiffs, partners in trade, entered into a composition with their creditors at 2s. 6d. in the pound; and, thereupon, the creditors executed to them a deed of release. That N. A. Calisher, on the part of Calisher & Co., who were amongst the creditors, executed the deed; but that previously to such execution there was a private stipulation between him and the plaintiffs, that as a further consideration for the release, Calisher and Co. should have an additional sum of 25l. 10s., to be secured by the plaintiff's acceptance; that accordingly N. A. Calisher drew a bill of exchange for that amount on the plaintiffs, which they

accepted upon the express understanding that this security was only to be held as an acknowledgment, and not to be negotiated; that, contrary to this understanding, Calisher & Co. endorsed the bill to the defendants, who had brought their action against the plaintiffs for the amount.

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The bill, which was for a discovery and an injunction to restrain the proceedings at law, charged that, under the circumstances, the acceptance of the plaintiffs was void, and a fraud upon the other creditors; that the defendants received the bill in question after it had become due and payable; that they paid no consideration for it, and that they were merely *trustees* for Calisher & Co. for the amount to be recovered upon it; and so it would appear if the defendants would discover and set forth the circumstances under which, and the consideration for which, the plaintiffs accepted the said bill, &c.

The defendants, by their answer, stated that in March 1835 they, at the request of N. A. Calisher, discounted a bill of exchange for 44*l.*, purporting to be drawn by Calisher and Co. upon and accepted by the plaintiffs; that shortly before that bill became due, they delivered it up to Calisher in consideration of his paying to them 18*l.* 18*s.* in cash, and indorsing to them the bill in question. They denied all personal knowledge of the transaction alleged to have taken place between N. A. Calisher and the plaintiffs. They denied that the bill in question had been indorsed to them before it became due, for the purposes stated in the bill or any other purpose: on the contrary, they alleged that it was indorsed to them for the consideration and purpose before mentioned, and not otherwise. They admitted that, being *bond fide* holders of the bill, they had commenced, and intended to prosecute, their action upon it. They also denied that the bill was void under any circumstances: "because, these defendants say, that they being the *bond fide* holders of the said bill of

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exchange, and having given full consideration for the same, without notice or reason to suspect or believe that the same was voidable or void, and the said bill being overdue and unpaid, are entitled to sue for and recover the amount thereof against the said plaintiffs."

The defendants having omitted to answer the charge as to their being trustees of the bill for the plaintiffs, an exception was taken to the answer in that respect.

Mr. Bagshawe, for the exception.

Mr. Bacon, contra.—The interrogatory as to the defendants being trustees, depends upon a mere inference of law. [*The Lord Chief Baron*.—Do you state that you mean to recover on the bill and hold the proceeds for your own benefit? All you state may be true, and yet you may hold as trustees for other persons]. The bill charges them with being trustees, and that so it would appear from certain circumstances, which are expressively negatived. It is not necessary that they should deny *totidem verbis* that they are trustees. [*The Lord Chief Baron*.—It would not be necessary, if you discovered facts which shewed the impossibility of their being trustees. The plaintiff files his bill of discovery, and alleges you to be trustees, upon the ground of particular circumstances, which he states. Those circumstances may not be true, but you may hold the bill as trustees under other circumstances. If you deny the particular circumstances, but do not deny the conclusion which the plaintiff draws from them, that is a negative pregnant. You ought to have answered not only as to the facts from which he draws his conclusion, but as to every thing from which such a conclusion might be drawn]. The inquiry of the plaintiff is confined to particular circumstances. He says, you are trustees under certain circumstances; tell me whether those circumstances are true? To this question there is an ex-

press denial. In *Bally v. Kenrick* (a), it is laid down very emphatically by *Richards*, C. B., that the sufficiency of an answer is to be tried by its materiality alone. Here, all the material facts on which the plaintiff's equity is founded are denied. The defendants state expressly that they are *bond fide* holders of the bill, and never knew or suspected that the same was void or voidable.

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Mr. Bagshawe, in reply, contended that the charge as to the defendants being trustees was distinct and general, and not to be restricted to the particular facts suggested as the foundation of the charge.

THE LORD CHIEF BARON.—This is not a sufficient answer. It is contended that the charge as to the defendants being trustees for the plaintiffs rests merely on a certain statement of facts made by the plaintiff. That is not so. There is a distinct charge that “the defendants are trustees for Calisher and Co. for the amount to be recovered on the said bill.” The plaintiffs then go on and say—“and so it would appear” if certain facts were stated. The defendants deny these facts, but they do not say that the truth might not appear from other causes. They indeed say that, being *bond fide* holders of the bill, they brought their action upon it. It is very true, they might be *bond fide* holders up to the time the action was brought; but they do not allege that being and remaining so up to this time, they brought their action. Their allegation is too uncertain to admit of an indictment for perjury, and, therefore, too uncertain for an answer. Denying a particular statement of facts on which a conclusion is founded, without denying the conclusion generally, is a negative pregnant. I am sorry that the defendants fail in this instance, because I think they intended to answer fully and honestly. Let it be understood, that in allowing this ex-

(a) 13 Price, 291.

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ception, I found myself on the circumstance that there is a distinct and substantive allegation that the plaintiffs are trustees.

Exception allowed.

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Testator devised a mixed fund of real and personal property to a trustee, upon trust to pay the rents, issues, and profits to certain persons, (amongst whom was his daughter M.), for their respective lives, and subject to those trusts he gave M. power to appoint by will the whole property. M. married, and, by a will executed in pursuance of the power, devised the whole fund to a trustee, upon trust to permit her husband to receive and take the rents, issues, and profits for his life, subject as thereafter mentioned; and in case she should leave any issue of the marriage, son or daughter, living at her decease, she charged the estate with 4,000*l.* for the benefit of that son or daughter; and after the decease of her husband she devised the whole fund to such son or daughter absolutely; she then proceeded as follows:—"And in case there shall be no issue of my marriage living at my decease, then I give, devise, and bequeath to my said dear husband all and singular my said estates and effects, to hold to him, his heirs, executors, &c., subject nevertheless and chargeable with the payment of 100*l.* to each of his sisters, A., B., C., and D. Aho, I give and bequeath to E. the sum of 200*l.*, to be paid to her within twelve calendar months next after my decease."—*Held*, that E.'s legacy was a charge upon the real estate over which M. exercised her power of appointment.

The circumstance that a mixed fund of real and personal estate is devised to the executor is not alone sufficient to make pecuniary legacies a charge upon the real estate.

NYSSSEN v. GRETTON.

JOHN GAMMOND, by his will, gave, devised, and bequeathed unto John Gibson, of Ross, in the county of Hereford, all his messuages, lands, tenements, and hereditaments, situate in the parish of Balcombe, or elsewhere in the county of Somerset; and all his messuages, lands, tenements, hereditaments, and real estates, as well in the parish of Much Marde, in the county of Hereford, as elsewhere in the kingdom of Great Britain; and also all and singular his personal estate and effects, and all other his estate whatsoever and wheresoever, to hold to him the said John Gibson, his heirs, executors, and administrators, upon trust, to let and set his freehold estates, and to receive the rents, issues, and profits thereof; and also to make sale of all his personal estate, and with what monies he had in hand, to place the same upon Government or other security as he should think fit; and collect and call in all monies that might be due and owing to the testator at the time of his decease, and out of the same to pay to the testator's sister, Mary Brown, an annuity or clear yearly sum of 60*l.* for her life: and the testator thereby directed his said trustee to pay the rents and profits of his said estate as aforesaid unto his wife, Ann Gammond, and his natural daughter, Mary

These are the words of the will.

Donne, otherwise Smith, in equal shares and proportions, for and during their natural lives; but if his said wife should thereafter intermarry, then he revoked the said bequest to her as aforesaid, and in lieu thereof gave and bequeathed to her one annuity of 50*l.* for her life; and from and immediately after the death or marriage of his said wife, the testator directed his said trustee to pay the whole of the rents and profits of his said estate and effects into the proper hands of his said daughter, Mary Donne, otherwise Smith. And in case his said sister, Mary Brown, and his said wife, should survive his said natural daughter, Mary Donne, otherwise Smith, *without issue* *her. H. L. Gretton.* and unmarried, then the testator revoked the said annuity of 60*l.*, so given to his said sister as aforesaid; and in lieu thereof directed his said trustee to pay the whole of the rents and profits of his said estate and effects unto his said sister and wife, (as long as she continued his widow and unmarried), in equal shares and proportions. But, nevertheless, his will and meaning was, and he thereby empowered his said natural daughter, Mary Donne, otherwise Smith, to give, devise, and dispose of all and singular his freehold estates and effects and premises to such person and persons, and for such estate and estates, uses, ends, intents, and purposes as his said daughter should by her last will and testament give and devise the same, or any instrument or writing purporting to be her last will and testament to be by her made, whether sole or covert, and executed in the presence of three or more credible witnesses.

Mary Donne, otherwise Smith, survived the testator and Anne Gammond, and married the Rev. G. H. L. Gretton. By her will, after reciting so much of the will of John Gammond as is above stated, she devised as follows:—
“Therefore I give, devise, and bequeath unto George Gretton, Dean of the Cathedral Church of Hereford, all and singular the said messuages, lands, tenements, heredit-

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aments, and all other my real estate whatsoever and wheresoever in the kingdom of Great Britain; and all and singular my personal estate and effects, and all other my estate whatsoever and wheresoever, upon trust, to permit and suffer my said dear husband, G. H. L. Gretton, to receive and take the rents, issues, and profits of my said estates as aforesaid, to and for his own use and benefit, for and during the term of his natural life, (subject nevertheless as is hereinafter mentioned), and upon this further trust, that in case there shall be any issue of my marriage with the said G. H. L. Gretton, being a son or daughter, living at the time of my decease, I will and direct that my said trustee, his heirs, executors, administrators, or assigns, do and shall, upon such son or daughter attaining his or her age of twenty-one years, or being a daughter, upon her attaining such age or day of marriage, which shall first happen, by and out of the rents, issues, and profits of my said estates as aforesaid, or by demise, sale, mortgage, or other disposition thereof, levy and raise the sum of four thousand pounds of lawful money of Great Britain, and pay the same unto such son or daughter, to and for his and their own absolute use and benefit. And I will and direct that the entire care and management of the education and advancement in the world of such son or daughter be left to my said dear husband; and from and immediately after the decease of my said husband, I give and devise and bequeath my said estates and effects as aforesaid unto such son or daughter, his or her heirs, executors, administrators, and assigns for ever; and in case there shall be no issue of my marriage with the said G. H. L. Gretton living at the time of my decease, then I give, devise, and bequeath unto my said dear husband all and singular my said estates and effects as aforesaid, To hold to him, his heirs, executors, administrators, and assigns for ever; subject nevertheless and chargeable with the payment of the sum of one hundred pounds to each of his sisters, (that is to say) Mary, Elizabeth,

Catherine, Susan, Georgiana, and Emma, which I do hereby give and bequeath to them accordingly. Also, I give and bequeath unto my godson, John Donne Collins, and Eliza Anne Gibson, eldest daughter of the said John Gibson, the sum of two hundred pounds each, to be paid to them within twelve calendar months next after my decease." The testatrix then provided for the reimbursement of the trustee's costs and expenses, and concluded her will by appointing George Gretton her sole executor.

Mary Gretton died in May, 1814, without issue, leaving her husband and the several other parties interested under her will (except John Donne Collins) surviving her. Eliza Anne Gibson married Henry Nyssen. Upon Mary Gretton's decease, George Gretton proved her will, and G. H. L. Gretton entered into the possession of the real estates thereby devised to him. In the year 1830, he sold and conveyed those estates to the defendants, Ernst and Clifford. Both George Gretton and G. H. L. Gretton died before the filing of the present bill.

The bill was filed by Henry Nyssen and his wife, against the surviving and only acting executor under the will of George Gretton, and against the purchasers of the real estates; praying that the legacy of 200*l.* bequeathed by the testatrix to Mrs. Nyssen might be paid out of the personal estate of the testatrix possessed by George Gretton; and in case the personal estate was insufficient for that purpose, that the deficiency might be supplied out of the rents and profits, or if necessary, by a sale of a competent part of the real estates over which the testatrix had a power of disposition.

To this bill the defendant Ernst, who was one of the purchasers of the real estates, demurred generally for want of equity.

Mr. Boteler and Mr. Hall, for the demurrer.—The legacy given to the plaintiff, Mrs. Nyssen, is a substantive

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independent gift, unconnected with any of the preceding clauses. There is, therefore, no necessary implication, and certainly there are no express words, shewing that the testatrix meant to charge this legacy on the real estate: *Davis v. Gardiner* (a), *Kightley v. Kightley* (b). In all the cases in which it has been held, that a legacy is charged upon the realty, the Court has proceeded upon particular expressions in the will, *ultra* the mere gift of the real and personal estate. Thus, in *Tomkins v. Tomkins* (c), the testator bequeathed certain legacies, and "after my debts and legacies paid," devised his real estates to his son; and upon this it was held that the legacies were charged on the real estates. *Alcock v. Sparhawk* (d), and *Hassel v. Hassel* (e), are cases of the same description. In *Aubrey v. Middleton* (f), the testator, after bequeathing legacies, devised "all the rest and residue" of his goods, chattels, and estate to his nephew; and that was held sufficient to charge the realty with the legacies. So, in *Bench v. Biles* (g), and *Cole v. Turner* (h), the ultimate devise being of the rest and residue of the real and personal estate, the legacies previously given were held to be charged on the realty. In the latter case, the Master of the Rolls took the distinction, that it was not a devise of the estates themselves, but of the residue of those estates after a prior purpose satisfied; that is to say, after payment of legacies. In *Kightley v. Kightley*, even the words "rest and residue, &c." had not the same effect as they have had in other cases; and the real estate was held to be exempt from the charge of legacies, notwithstanding the strong words at the beginning of the will. [The Lord Chief Baron.—But in that case there was some-

(a) 2 P. W. 187.

(b) 2 Ves. J. 332.

(c) Pre. Ch. 397.

(d) 2 Vern. 228.

(e) 2 Dick. 527.

(f) 4 Vin. Abr. 460.

(g) 4 Madd. 187.

(h) 4 Russ. 376.

thing to which the words "rest and residue" might be referred; namely, the real and personal estate previously devised]. At all events, in order to make the legacies a charge on the real estate, it is not enough that both the real and personal estate should come to the same person: *Parker v. Fearnley* (i). Where there are no express words to fix that person with the payment of debts and legacies, he must either be devisee of the rest and residue of the real estate, or there must be some direction to him to see the debts and legacies paid. Here, there is nothing to shew that the plaintiff's legacy was more than a common pecuniary legacy. It was payable absolutely within a year of the decease of the testatrix. Of the bequests which are expressly charged on the real estate, those to the children might not be payable for twenty years after the death of the testatrix; and those to the sisters depended altogether upon a contingency, and might not be payable at all, so that the legacy in question, therefore, differs entirely from the others, in the mode and circumstances in which it is given. [The *Lord Chief Baron*.—The words, "subject as hereinafter mentioned," are important.] Those words refer, in the first instance, to the bequest to the children; and in the second, to the bequest to the sisters. The legacy to the plaintiff is to be considered apart from those words; as if it had been contained in a codicil. [The *Lord Chief Baron*.—The whole property is, in the first place, devised to George Gretton; and the question is, whether all the subsequent gifts are not carved out of that].

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Mr. *Girdlestone* for the bill.—The first question is, what the testatrix proposed to do—and the next, what she has actually done. She states upon her will what she proposed to do. She recites her father's will, under which

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she has a power of appointment over a blended fund of real and personal estate, and she proposes to exercise that power in favour of the several legatees named. After setting out the power at full length, she says, "Therefore I give, devise," &c., all the property, real and personal, comprised in the power, to George Gretton, upon certain trusts. The first trust is to permit her husband to receive the rents and profits of the real estates for his life, "subject as hereinafter mentioned:" then follows a trust to raise 4000*l.*, for a son or daughter, should there be any, out of the rents and profits, or by sale or mortgage of those estates; and upon the death of her husband, she devises the estates to such son or daughter in fee. It is insisted that the words "subject as hereinafter mentioned," must be confined to this direction to raise the 4000*l.*, and do not apply to any thing afterwards. That cannot be so; because, as between the husband and the party entitled to the reversion, the 4000*l.* would be a charge upon the *corpus* of the estate, and not merely upon the husband's life interest. The testatrix then proceeds to dispose of her property, in the event of there being no children. In that event, she makes a clear and absolute disposition of the whole blended property to her husband, and what comes afterwards must be considered as carved out of that interest. She gives the whole property to him, subject to the charges in favour of the sisters; subject "also" to the legacies to Collins and the plaintiff, Mrs. Nyssen. The word "also" has the effect of excepting those legacies from the operation of the previous devise to the husband. [The *Lord Chief Baron*.—That argument would fail, if the devise to the husband did not take effect]. In that case the legatees would take under the previous words, "subject as hereinafter mentioned." But even supposing the legacies to Collins and Mrs. Nyssen to be substantive bequests, entirely independent of the devise to the husband, they are given after a previous

disposition of a blended fund of realty and personalty, and that shews that they were intended to be charged on the realty. Notwithstanding the opinion of the Court in *Kightley v. Kightley*, there is no difference between debts and legacies in an implied charge upon real estate by will: *Williams v. Chitty (a)*. The case of *Parker v. Fearnley* has been cited to shew that the blending of the fund is immaterial; but there the testatrix expressly directed that the legacies should be paid "by her executor thereafter named," which was no more than a direction to pay them in the usual manner. In *Kidney v. Cousmaker (n)*, it is expressly laid down by Lord Thurlow, that where a testator combines real with personal property, all the burthens of the personal property are put upon the real property so combined with it. If you find the two kinds of property combined, you must conclude that the testator combined them for one purpose. The case of *Bench v. Biles* settles the question. There, the testator gave all his real and personal estate to his wife for life; and after her death bequeathed various legacies, and gave all the rest, residue, and remainder of his real and personal estate to his two nephews, share and share alike, their heirs, executors, administrators, and assigns. There was nothing stronger in favour of the charge in that case than there is here. There was a distinct and independent bequest of pecuniary legacies. It is true, that the devise was of the rest and residue; but that was equivalent to a devise of the whole blended fund, taking out enough to satisfy the pecuniary bequest; and the judgment of the Court proceeded upon that view of the question. In that case the testator gave a part of the fund, and then gave the residue: here, she gives the whole, and then gives a part out of it. There is no substantial difference between the two cases.

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(a) 3 Ves. 551.

(b) 1 Ves. jun. 444.

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Mr. *Boteler*, in reply.—In *Kidney v. Cousmaker*, a sale of the real estate was directed, and the words of the Court must be taken with reference to the case where real estate is to be converted into money. It is a mistake to call this a mixed fund. The testatrix had, under the will of her father, power to dispose of real and personal estate. She might have passed each separately, and had not a mere power to dispose of it as a mixed fund. The devise of real estate is a specific devise, though of the whole. This is a devise of real estate *quoad* the real estate, and of the personal estate *quoad* the personal estate. There is no forming of a single fund for a particular purpose, but a gift of all she had to give. The cases which have been cited went upon the intention of the testator to give the devisee of the residue only that which was left after payment of legacies. That intention was apparent in the cases of *Bench v. Biles*, and *Cole v. Turner*; and accordingly the real estate was held chargeable. In the former of these cases the Court certainly speaks of a blended fund, but that is an inaccurate expression. [The Lord Chief Baron.—I wish to see the principle contended for on the other side put in relief, and not mixed up with other circumstances. Suppose a person devises all his real and personal estate to his executor, and then gives legacies to A., B., and C.; would the executor be trustee of the real estate for the legatees?] According to *Parker v. Fearnley*, he would not. There must be express words, beyond the mere gift of both properties to one individual, to make the real estate chargeable with legacies. Then the question is, whether such express words exist in the present will. The whole property, real and personal, is given to a trustee, his heirs, &c., upon trust for the husband for life, “subject as hereinafter mentioned.” Now, if those words had been meant to extend to every thing coming afterwards, they would have been fixed to the estate of the trustees, and not to that of the husband. But they clearly

have reference only to the life estate of the husband; and this appears more plainly, when it is seen that afterwards, in devising the property to the children upon the death of the husband, the testatrix drops the word "subject" altogether, and devises it to them absolutely. Then, again, in the event of having no son or daughter, she charges the husband's estate for the benefit of his sisters. That was natural enough; for there might be sufficient for that purpose in one case and not in the other; yet that might be a reason for her not charging this particular legacy upon it.

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THE LORD CHIEF BARON.—Upon looking at the will and the several cases cited, it appears to me that there is sufficient in this will to justify me in declaring that the legacy in question was a charge on the real estate. It has always appeared to me very idle, to look at cases upon the construction of wills, for the purpose of finding a precise precedent for that which is under discussion. All that can be done is, to find what general principle of law is applicable, and then it must be determined, from the particular circumstances of each case, how far that principle is to be illustrated. I have looked at the several cases, and I find only two rules which govern them which are not rules of construction, but of law. One is, (what is familiar to every one), that, *prima facie*, all legacies are paid out of the personal estate; the other is, that if it appears to be the intention of the testator, as collected from his will, that the legacies should be charged on real estate, then they should be charged on the real estate. Whether the testator so intended depends on particular expressions of doubtful character appearing in the will, and the Judge determines the point according to the language of the will; not according to any rule of law, but as he would construe the intention of a party from any other document laid before him.

Nov. 22nd.

It has been said, and truly, that, where a testator gives his real and personal estate to one individual, subject to

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legacies, that makes the real as well as the personal estate a fund for the payment of those legacies. Again, where a person bequeaths legacies, and afterwards devises the real and residue of his real estate, after payment of his debts and legacies, that is a ground upon which it is reasonable to suppose that he intended to bequeath his real estate subject to the payment of legacies. A variety of examples might be put, in which the precise expressions of the testator might affect the construction of the will in this respect. If a man left legacies generally, and then left his real and personal property to an individual, it would not from thence be inferred that he meant to charge them on his real estate; but if he left legacies, and devised his real and personal property to his executor, and directed his executor to see the legacies paid, you would infer from that direction given to the person to whom he left all the real estate, that he meant to charge them on the real estate.

I can find no case precisely like the present. It was contended for the plaintiff, that wherever the testator leaves the whole real and personal estate embodied in one bequest to one individual, that is a principle to determine that the legacies left afterwards are to come out of the real estate. I own I can find no such principle in any of the authorities. The case of *Bench v. Biles*, not only involved the circumstance of the whole of the real and personal estate being devised to one party, but it contained a direction that that whole should be paid to him after payment of legacies. In the present case the ground of my decision is taken from the whole will. In the first place, this is not properly a will, but an instrument in execution of a power. It is executed by a married woman, and she recites a power given to her under the will of her father. All his estates, real and personal, had been vested in a trustee for the purpose of paying his wife an annuity, and other objects: and then it contains a power to her to appoint the whole to whom she pleases. The whole had been blended in one fund by the settlement of her ancestor,

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and what she does is, to execute the power. She in fact leaves the whole to her husband for life; and in case she leaves any child, son or daughter, she means them to have it absolutely after her husband's death. In case she has no son or daughter, she gives the whole to her husband—that is the effect of it—"subject as hereinafter mentioned." Subject to what? All that comes afterwards must be taken out of the fund so left to the husband. Then, in case she has a child, son or daughter, she directs 4000*l.* to be raised out of the estate for that son or daughter. If she has no son or daughter, she directs that her husband, having the whole estate absolutely, shall pay 100*l.* to each of his sisters, and then she gives the legacies in question to the two persons named, who say that the words "subject as hereinafter mentioned," extend to the whole property. I see no reason why they should not extend to the whole. It was ingeniously argued by Mr. *Boteler*, that those words ought not to be considered as applying to the whole, because, in the devise to the sisters, the testatrix uses the word "subject" again. But it appears to me that the case stands thus:—She gives the whole estate to her husband in case she should leave no children living at her death, they being the first objects of her bounty; but in that contingency, she gives it to her husband subject to a charge in favour of his sisters. Now the legacies to the sisters are conditional, and depend on his having an estate in fee. If he had not the fee, they would get nothing. Therefore, when she came to dispose of the fee to her husband in the event of there being no children, she thought it necessary, for the purpose of the charge in favour of the sisters, to introduce the word "subject" again. But if, after charging the real estate, first with the 4000*l.*, and afterwards, in another event, with the several sums of 100*l.*, she intended that the plaintiff's legacy should not be chargeable upon it, why did she not use language to that effect? In point of construction, the second word "subject" comes before the legacy to the sis-

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ters, and after the bequest of the real and personal estate ; and, therefore, I see no reason why I should not limit its operation to that legacy. The testatrix doubted whether the estate in fee of the husband would be subject to his sisters' legacies if she omitted to use words for that purpose ; therefore, in the second instance, she uses the word subject as applicable to that bequest alone. But the legacy to Mrs. Nyssen is absolute and unconditional, and must be paid, whether the husband has a life estate, or an estate in fee. Upon these grounds, not thinking that this case is precisely like any other upon the same point, it appears to me that I must overrule the demurrer.

Demurrer overruled.

June 28th.
Dec. 12th.

DAVIES v. THOMAS.

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children should attain twenty-one, (which she did), she should derive no benefit under his will. The will contained a clause that the trustees' receipts should be a sufficient discharge to the purchaser for the purchase money to be paid for the premises, and that the purchaser should not be bound to see to the application thereof. The testator appointed his wife and David Davies executors of his will.

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The testator died in January, 1819, leaving several children. David Davies proved the will. In 1814, Abel Lloyd and Robert Kyffin contracted to sell the estate to John Lloyd, the son of Abel Lloyd, for the sum of 2,242*l.* 14*s.* 6*d.*, and he was let into possession.

By articles dated the 11th August, 1815, which was after the above-mentioned contract for purchase by John Lloyd, but before the premises were actually conveyed to him, Abel Lloyd and John Lloyd, in contemplation of a marriage which was shortly afterwards had between John Lloyd and Elizabeth Jones, an infant, covenanted that they would, within a year after the celebration of the marriage, convey the premises to the use of John Lloyd for his life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of trustees for the term of 500 years, for raising 1000*l.* for portioning the younger children of the marriage, with remainder to the use of the first and other sons of the marriage in tail, with remainder to the use of the daughters of the marriage in tail.

By indentures of lease and release, dated the 1st and 2nd May, 1817, to which David Davies, the executor, and Robert Davies, the eldest son of the testator, were parties, the premises were conveyed by Abel Lloyd to John Lloyd in fee. The consideration for that conveyance was expressed to be the sum of 2,242*l.* 14*s.* 6*d.*; but the only part of the purchase-money actually paid or settled in account, was the sum of 1,349*l.* 3*s.* 1*d.*, which sum con-

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sisted of the debt of 991*l.* due to David Davies, and the accumulations of interest thereon. The remainder of the purchase-money, amounting to 895*l.* 11*s.* 5*d.*, was never paid by John Lloyd; but, as a collateral security for that sum, he executed a bond to that amount to Abel Lloyd, who was then the surviving trustee. In that bond, which bore date the 2nd May, 1817, David Davies joined as a surety.

By indentures of lease and release and settlement, dated the 11th and 12th August, 1820, and executed after the marriage of John Lloyd, the premises in question were conveyed to trustees to uses, in pursuance of the articles. David Davies and Robert Davies were parties to that settlement.

In 1822, the younger children of the testator, John Davies, instituted a suit in this court, praying an account of the testator's personal estate, and of the rents, profits, and produce of his real estate, and that their respective shares in the residue might be paid or secured to them. In that suit, Abel Lloyd, David Davies, and Robert Davies, were defendants; and in February, 1826, it was, amongst other things, ordered and decreed that the defendant, Abel Lloyd, should forthwith proceed to recover and get in the principal and interest due from John Lloyd, and the defendant, David Davies, upon the bond of the 2nd of May, 1817, and in case the defendant, Abel Lloyd, should not within three months from the date of that decree proceed to recover and get in the same, then it was ordered that the plaintiffs should be at liberty to use the name of the defendant, Abel Lloyd, and to institute such proceedings in his name as they should be advised for the recovery thereof.

In September, 1826, John Lloyd died intestate, leaving his widow (formerly Elizabeth Jones) and two children of their marriage, surviving him. Upon this, the action directed by the decree to be brought against John Lloyd,

was brought against his widow as his administratrix; but for default of assets of the intestate, nothing was recovered in the action. An action, as directed by the decree, was also brought against David Davies, but he took the benefit of the Insolvent Debtors' Act, and nothing was recoverable from his estate.

In May, 1828, Abel Lloyd died insolvent.

The present bill, which was one of revivor and supplement, was filed for the purpose of establishing a lien claimed by the children of John Davies, upon his estate, to the amount of 895*l.* 11*s.* 5*d.*, the residue of the purchase-money due from John Lloyd. The plaintiffs were such of the children of John Davies as were infants at the time of decree in the original suit. The defendants, in addition to those in the original bill, or their representatives, were the other children of John Davies, the infant children of John Lloyd, and the trustees under John Lloyd's marriage settlement.

The bill charged, that when the marriage articles were entered into, John Lloyd had notice that his father, Abel Lloyd, had no title to the premises, other than as one of the trustees for sale under the will of the testator John Davies, and that he had no power to contract to settle the same; and that John Lloyd had also notice, that the children of the testator were entitled to the surplus produce of the sale of the premises.

In support of this charge it appeared, that in the deed of release of the 2nd May, 1817, Abel Lloyd was described as "surviving devisee in trust for sale under the will of the said John Davies;" and that this deed of release was recited in the subsequent indenture of settlement of the 12th August, 1820. It likewise appeared that Messrs. John and Edward Oldfield, with full notice of the trusts of the will of John Davies, acted as the solicitors of Abel Lloyd and John Lloyd in relation to this purchase, that they prepared the deeds of conveyance, and likewise pre-

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pared and were attesting witnesses to the bond ; and that one of them, John Oldfield, was a trustee under the settlement. Mr. Edward Oldfield in his examination stated, that although a receipt for the whole purchase money was endorsed on the deed of the 2nd May, 1817, he could not say that any portion of the same was, at the time of the execution of that deed, or at any other time, actually paid by John Lloyd to Abel Lloyd ; and he believed that the sum of 895*l.* 11*s.* 5*d.*, for which John Lloyd's bond was given, was part of the money purporting by such endorsement to have been paid by John Lloyd.

Mr. Simpkinson and *Mr. Koe* for the bill.—Abel Lloyd had no interest in the premises, except as a devisee in trust, under the will of the testator. He had no right to enter into such an agreement as he entered into with his son. The purchase money under that agreement has not been all paid ; and the question is, whether the lien which once existed on the estate for the deficiency, can be said to have been discharged. In that respect, the articles of settlement can have but little effect ; for even if the parties were purchasers for a valuable consideration without notice, mere articles would not entitle them to insist upon such a plea ; there must be an actual conveyance. It is no answer to such a claim as this to say, that at the time of the contract there was no notice ; the party must shew that he had no notice at the time of the conveyance.

John Lloyd must have had notice not only of the trusts of the will, but also that the purchase money was not paid ; and all parties claiming under him must be held to have had constructive notice of the trusts of the will. The purchase deed of May, 1817, refers to the will. That deed is virtually incorporated in the settlement by means of a recital ; and consequently it conveys notice of the will. The parties, therefore, who derive title under the settlement, must have had notice of the trusts for the testator's children ;

and it was incumbent upon them to see that the purchase money for the trust estate had been *bond fide* paid to the proper person. Besides, they had notice through the medium of their solicitors, not merely of the trusts of the will, but that the money secured by bond as a collateral security for part of the purchase money had not been paid. It is clear, therefore, that they cannot insist on the want of notice, and that the lien remains. The vendor remains owner till all the purchase money is paid. The purchaser giving a bond for payment of the purchase money does not discharge the estate. Abel Lloyd might at any time have resorted to the estate. He stood in the mere situation of a trustee, selling it for other persons. His *cestui que trusts* may work out their equities through him, to have the purchase money raised out of the estate. The persons claiming under John Lloyd have no better title than he had, and he had no title to an estate other than an estate charged with the purchase money.

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Mr. *Ombler*, for the defendants in the same interest with the plaintiff.

Mr. *Duckworth*, for other defendants.

Mr. *Temple* and Mr. *Tennant*, for the trustees and infant children of John Lloyd.—The infant children of John Lloyd are purchasers for a valuable consideration, without notice of the trusts of the will. The original decree must have decided this point. It must have been founded on the hypothesis that there was no lien; otherwise it would have declared the estate liable to make up the deficiency by sale or mortgage. The plaintiffs ask the same benefit by their original bill as they do now; and they cannot raise the question by supplemental bill. This is in fact the same case as was heard before the Chief Baron in 1826; and

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without a rehearing, the Court cannot depart from the equity which was then administered.

But supposing there were no decree, the question would be, whether, under the circumstances disclosed, the children of the marriage of John Lloyd can be deprived of the benefit of their mother's marriage contract, when she became the wife of their father. There is no authority for saying that the children are bound by the notice to John Lloyd. In order to bind them, it must be shewn that the mother or her guardian had notice. What could the notice amount to? That part of the purchase money was not paid, but a security taken. Why could not those parties take a security? The testator directed the estate to be converted into money. It was therefore the duty of the trustee to pay the purchase money to the executor, to be placed upon such security as he might approve. The executor had a right to invest the money on bond or mortgage, if he pleased; taking upon himself the responsibility of that security. Here, the executor approved the security which was offered, and was, as well as Abel Lloyd, a party to the deed of conveyance. Robert Davies, the testator's eldest son, was also of age, and accepted the security.

It appears from the will that the purchaser was not to be bound to see to the application of the purchase money, but that the receipt of the trustee was to be a sufficient discharge to the purchaser. The marriage consideration made this a purchase. [*Alderson, B.*—The purchaser was not bound to see to the application of the purchase money, but here there was no receipt of the money.] The receipt indorsed on the conveyance would be evidence of the payment of the money in favour of all persons except John Lloyd. Those who contract with John Lloyd are not to be affected by his misrepresentations. He represents that he is the owner of the property. He covenants that he will, within one year, grant the pre-

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mises to secure a jointure for his wife and a provision for his children. Being owner only of an equitable interest in the property, he gets an absolute conveyance, and when afterwards called upon to complete his marriage contract, he does so by a settlement reciting the deed of 1817, which purports to be the absolute conveyance. Amongst the parties actually joining in the deed of settlement are the trustee, executor, and the heir-at-law of the testator, who are also parties to the deed of 1817. [*Alderson, B.*—When John Lloyd, in 1814, contracted to settle the property, he had not paid the purchase money. Afterwards he is called upon to settle such estate as he had when he contracted.] Our only notice is, that he claims to be owner of the estate. When called upon, he shews what satisfies a conveyancer that he is so, namely, the receipt for the purchase money, and that all the proper parties have joined in the instruments of conveyance. There was no fraud in the wife, and she and her children ought not to suffer for the acts of Abel Lloyd, against whom they have no remedy. They do not call on the Court to aid them in enforcing their own rights, but to defend them against parties seeking to deprive them of their rights. Those parties could not stand an instant in a court of law; why, then, should a court of equity interfere in their favour? The trustees for the widow and children having obtained the legal estate in 1820, it is immaterial what notice they had before that time. Besides, notice of the trusts of the will is not notice that the purchase money has not been paid.

Mr. Simpkison, in reply.—It is said that the point in issue has been already adjudicated, and that no supplemental bill will lie. That is not so; because neither John Lloyd, nor the trustees, nor the parties claiming under John Lloyd, were ever before the Court. The bill could not, therefore, by possibility raise the question of lien. Then, has the question of lien been displaced? They admit,

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that if John Lloyd had been a purchaser on his own behalf, and they claimed under him as volunteers, they could not be in a better situation than he; but then they say that his children are purchasers for a valuable consideration, and that the marriage consideration is the highest; that, therefore, they are not to be affected, unless it can be shewn that the mother, or some one who had the charge of her interests when the settlement was made, had notice. That argument would be good, either if the will was out of the question, or they had no notice of the will, and supposing that under the terms of the will a derivative purchaser was not bound to see to the original purchase money being paid. But the mere contract antecedent to the settlement will be nothing in favour of the children, unless it can be shewn that at the time of the actual execution of the settlement the parties had no notice. When a purchase for a valuable consideration is pleaded, it is not enough to say that there was no notice at the time of the payment of the money: it must be averred that there was none at the time of the execution of the conveyance. Now, whether the wife had notice or not at the time of the execution of the articles, it is clear, that at the time of the settlement all the parties had notice. No one can read the conveyance and settlement without coming to that conclusion.

The clause in the will relieving the purchaser from the necessity of seeing to the application of the purchase money, only applies to money actually paid. Both the original and the derivative purchaser are bound to see to the payment of the purchase money. Here, a large portion of the purchase money was left outstanding upon a collateral security; and it is clear that the purchaser was bound to see that it was paid to the parties entitled to it.

Dec. 12th.

ALDERSON, B.—The only question in this case is—whether the plaintiffs are entitled to claim a lien on the estate of the late John Davies to the amount of 895*l.* 11*s.* 5*d.*

The estate belonged originally to John Davies, by whose will it was devised to Abel Lloyd and Robert Kyffin, in trust to raise by mortgage or sale the amount due to David Davies; and, if sold, to divide the residue, after David Davies's debt was paid, between the testator's children. Under this power the estate was bargained to be sold by Abel Lloyd and Robert Kyffin to Hugh Hughes, as agent for John Lloyd, for the sum of 2,242*l.* 1*s.* 6*d.*; and afterwards, in 1817, by a deed of release, which recited the will of John Davies, the amount of the debt with interest then due to David Davies, and all the other material facts, the estate in question was conveyed by Abel Lloyd, therein described as the surviving devisee for sale under the will of John Davies, to John Lloyd and his trustees.

In point of fact, the whole purchase money was not paid, but only the debt due to David Davies, and a portion of the residue, the whole of which was devisable amongst the children of John Davies under his will. The remainder, being the sum of 895*l.* 11*s.* 5*d.*, was secured by the joint bond of John Lloyd and David Davies. Now, for this amount there was clearly at that time a lien on the estate sold.

John Lloyd, as a party to this transaction, had, of course, full knowledge of the will of John Davies, and of this breach of trust, in leaving a part of the purchase-money thus unpaid; and if the defendants are volunteers claiming under him, they will be in the same situation in which he would have been. As to him, it is not doubted that the plaintiffs would be entitled to the lien on the estate now claimed by them.

But the case of the defendants is twofold. First—They say that this question has already been decided by this Court. I think, however, that this was not so; neither John Lloyd nor his descendants were then parties to the suit, and this point could not properly have come before the Court: this, therefore, is not a good defence. But

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then, secondly, it was urged that the children of John Lloyd are purchasers for valuable consideration and without notice, and therefore are entitled to the judgment of the Court. This marriage, it may be admitted, was a valuable consideration; and if the marriage took place, and the settlement was made without notice of the will of John Davies, and of the money not having been paid, the case would be different. I delayed my judgment on this point till I could examine the deeds.

The articles, previous to the marriage, are dated in 1815, and by them there is an engagement to convey these estates to certain uses thereafter stated. No notice is there taken of John Davies's will. At that time there had been no conveyance, nor any money paid for the estate in question, nor the bond given for the residue: this took place subsequently, in 1817.

The settlement itself was executed in 1820, and after the marriage. It is true that this, being in pursuance of previous articles, could not be voluntary. But here, in the settlement itself, there was, I think, sufficient notice; for the will of John Davies is distinctly referred to in it, and that ought to have led the parties to make the requisite inquiries; and if that had been done, they would have found that there was a lien on the estate for the residue of the purchase money. This, therefore, is equivalent to notice; and this second defence also fails. The decree must therefore contain a declaration as claimed by the plaintiff of the existence of the lien.

This was the only point in dispute argued before me.

Decree accordingly.

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CLARKE v. CLARKE.

C 7-45-

June 29th,
July 7th.

THIS was a bill by a rector against the occupier of a farm, praying an account and satisfaction of tithes of various tithable matters, amongst which were turnips. The plaintiff had been in the habit of compounding for his tithes. In 1833, the defendant, being dissatisfied with the amount of the composition, applied for a reduction, but his request was refused. Disputes afterwards took place between the parties, and the defendant was called upon to set out his tithes. Instead, however, of setting out the turnips in heaps, he threw out every tenth turnip. The rector's tithingman refused to take the tithe in this form.

The reasonable-
ness of setting
out every tenth
turnip, instead
of every tenth
heap of turnips,
for the parson,
must depend
upon whether,
by that mode
of tithing, the
parson has an
opportunity of
seeing that the
tithe is fairly
set out.

Mr. *Simpkinson* and Mr. *Monro*, for the plaintiff, contended that this mode of setting out the tithe of turnips was not allowable; observing, that the law upon that point was settled by the case of *Beaumont v. Shilcot* (a).

Mr. *Boteler* and Mr. *Walker*, for the defendant.—In *Beaumont v. Shepherd*, the bill was dismissed: the decision, therefore, in that case is in favour of the defendant. Another case, however, that of *Blamey v. Whitaker* (b), seems conclusive as to the defendant's right to set out the tithe turnips in heaps. The observations of Lord *Mansfield* and Mr. Justice *Buller* in that case are very strong. No fraud is imputed to the defendant. The plaintiff's own tithe-gatherer does not venture to say that the tithe was not fairly set out: all he says is, that one or two turnips were damaged. The only question is, whether the defendant *bonâ fide* drew the turnips for the feeding of his cattle. If he did, he has a right to set out the tithe in

(a) 3 Gwill. 944; 2 E. & Y.
226.

(b) 3 Dougl. 183; 10 East, 12,
cited.

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this manner. [*Alderson, B.*—I agree to the principle laid down in the case in *Douglas*, that the farmer is not bound to expend more labour upon the parson's turnips than on his own. On the other hand, the tithe-owner has a right to have an opportunity of seeing that the tithe is fairly set out. Now, if this mode of tithing be adopted, is the parson capable of seeing whether the tenth turnip is of a medium size? A custom in the parish, in regard to this, would of course bind the parties; but otherwise this mode seems to me to be open to fraud]. At all events, this manner of tithing is recognised in the cases cited.

Mr. Simpkinson in reply.

ALDERSON, B.—It appears to me that the question whether, in the absence of any customary mode of tithing, and under all the circumstances of this case, this was a reasonable mode of setting out the tithe, must depend upon the fact, as to the parson having had an opportunity of seeing it set out fairly. Every such case must depend upon its own circumstances. If the quantity of turnips drawn be large, this may not be a reasonable way of setting out the tithe; if the quantity drawn be small, it may be the most reasonable way. It may be reasonable to set out the turnips in rows. Any mode by which one party sets out the tithe so as to enable the other party to see that it is fairly done, is the right mode. I shall look into the evidence, to see how that principle applies here.

July 7th.

On this day his Lordship said he had examined the evidence, and he was of opinion that the decree upon this point must be for the plaintiff.

Decree accordingly.

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WEBB v. LUGAR.

Ct. 450

July 6th.

Dec. 12.

Case? **SOME** time previously to the year 1736, the Archdeacon of Colchester granted to one Lee Warley a lease for three years of the parsonage and rectorial tithes of Ardleigh, in the county of Essex; which lease was, in the year 1736, purchased of Warley by William Lugar. The purchaser being at that time owner in fee of a farm at Ardleigh, called Badley Hall farm, the purchase was made in the name of his brother, James Lugar, to whom the lease was duly assigned, in trust for William Lugar. Soon afterwards James Lugar executed a declaration of trust, to the effect that the lease was purchased with the proper monies of William Lugar, and that he, James Lugar, held it only as trustee for his brother.

The original lease given to Lee Warley contained no covenant for renewal, but the assignment to William Lugar was of all the estate and interest of Lee Warley in the parsonage and tithes, with *benefit of renewal* of the lease, &c.

William Lugar died in 1752, seised of the Badley Hall farm, and possessed of the before-mentioned lease. Shortly before his death he devised the Badley Hall farm in moieties to his two nephews in tail male, and he gave and devised all his estates, rights, and interest in and to the parsonage of Ardleigh aforesaid, with the houses, barns, stables, lands, tithes, perquisites, privileges, and appurtenances to the same belonging, unto his brother, James Lugar, his executors, administrators, and assigns, but upon this condition, nevertheless, that his said brother, James Lugar, his executors, administrators, and assigns,

A testator, being seised in fee of a farm in the parish of A., and being also possessed of a lease for lives of the rectorial tithes of that parish, devised the farm to his nephews in tail male, and the lease to his brother J., his executors, administrators, and assigns, upon condition that his said brother J., his executors, administrators, and assigns, owners or occupiers of the said parsonage, tithes, and premises, should, at all times after his decease, free and discharge his said farm from all manner of tithes which should be payable out of the same to the said owner or occupier of the parsonage and tithes aforesaid. J. survived the testator, and devised his interest in the lease to his four sons, who took several

renewals, and in 1782 assigned the existing lease, for a valuable consideration, to A. B., with notice of the trusts of the will:—*Held*, that a party to whom the tithes were bequeathed by the will of A. B., and who took a renewal of the lease in 1817, held the renewed lease upon the trusts of the will; consequently, that he had no title to the tithes of the farm, and that the owner of the farm was not bound to contribute to the renewal fines.

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owners or occupiers of the said parsonage, tithes, and premises, should at all times, after his decease, free and discharge all and every his said farm and lands called Badley Hall of and from all manner of tithes and portions of tithe which should arise and be payable out of the same to the said owner or occupier of the parsonage and tithes of Ardleigh aforesaid.

James Lugar survived the testator, and died in 1755, leaving his interest in the lease to his four sons, who from time to time obtained renewals of the leases, the particulars of which are stated in the judgment. It appeared from the recitals in the renewed leases that they were executed in consideration of the surrender of the old leases.

In 1782, the parties entitled to the lease under the will of James Lugar assigned it for a valuable consideration to Abraham Newman, who thereupon held it, as to three-fourths, for his own benefit, and as to the remaining one-fourth in trust for one Marshall Lugar.

The present bill was filed by the plaintiff, claiming title under the will of Abraham Newman, and by purchase from Marshall Lugar, against the defendant, as the owner and occupier of the Badley Hall farm, to recover the tithes of that property. The nature of the defence was, that under the will of William Lugar the Badley Hall farm was exempt from the payment of tithes, and that the plaintiff must be considered as having had notice of such exemption. The circumstances of notice are stated in the arguments and judgment.

The cause now came on to be heard on admissions.

Mr. G. Richards (with whom was *Mr. J. Russell*) for the plaintiff.—The words of the will were binding only during the continuance of the lease which then existed, and do not apply to the individual who is now the owner and purchaser of the tithes of Ardleigh. This is not like a covenant running with the land, and binding the party in occupation.

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At the time the testator made his will, he contemplated merely the existing lease. He knew that the only interest he had was in the three lives. Indeed, he could not bind future lessees, for he had no right to compel the Archdeacon to renew. After the lives had run out, the occupiers of the Badley Hall farm could not compel the lessees of the tithes to discharge them. This case is distinguishable from that where a tenant for life, under a renewable lease, renews, and says he will not hold it for the benefit of the parties entitled to renew. Here the parties in possession of the Badley Hall farm were strangers. It is said that the assignment was made by Lee Warley to William Lugar, with benefit of renewal; but there is no covenant to renew in the lease of 1736. If the words of condition contained in this will are to apply to the renewed leases, the consequence will be to exempt Badley Hall farm from the payment of tithes for all period of time. The defendant contends that those words operate by estoppel against the claim of the present occupiers of the parsonage. They cannot however have that effect, because they amount only to a condition imposed upon the party: they create no trust benefiting the party in possession of the Badley Hall farm at the expense of the owner of the tithes. Another question is, whether the defendant can avail himself of this defence without proving that the plaintiff had notice of the condition in the will. The plaintiff is in the ordinary situation of a party who appears in a court of equity, having paid a valuable consideration without notice; he cannot therefore be removed from his own rights. Although James Lugar executed the declaration of trust, it does not appear that Abraham Newman, who purchased the lease in 1782, had notice of the declaration of trust, or the condition. The same observation applies to the plaintiff when he purchased the remaining one-fourth in 1827.

This is a bill filed by a party in his legal right. The

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lessee of a rector appears in equity as in law; the bill for tithes being a mere action of account. There can be no defence therefore in equity which cannot be set up at law. The present defence is, that the plaintiff has taken these tithes upon a condition which he is bound to fulfil; but that would be no defence at law, and is, therefore, no defence in equity. The defendant, it is true, might have filed a cross bill, alleging himself to be interested in the tithes of the Badley Hall farm, but in that case he must have contributed to the fines which the parties in the occupation of the parsonage are bound to pay.

Mr. *Simpkinson* and Mr. *Lovat*, for the defendant.—The argument relative to the necessity of filing a cross bill cannot be maintained for a moment, for no *cestui que trust* can be compelled by his trustee to take that course. The real question is—whether the plaintiff, who is now the lessee of the rectory, and who claims through the parties deriving title under the will of William Lugar, has not taken the lease subject to the trusts of that will. Let us first take the case as if it were a question between the defendant and a devisee of James Lugar. Whether the words of the will amount to a condition or a trust is immaterial. In either case the court will carry the testator's intention into effect. It is true that the will does not expressly allude to a renewal; and it does not appear that in the assignment to Abraham Newman the word renewal is mentioned. But that will not affect the question, for the renewal of the former lease is the renewal of the trusts of that lease. It is indisputable that, during the continuance of the former lease, James Lugar, and those claiming under him, were bound to exonerate the farm from the payment of these tithes. When that lease was renewed, the trusts upon which it was held were renewed. There are many authorities to shew that a person having an interest in a lease, and renewing it, takes the renewal for the benefit of

all parties interested in the former lease. It would be a breach of trust for him to treat for the renewal behind the backs of the parties interested. A tenant right of renewal, though not a legal, and in some sense, not an equitable right, is, under such circumstances, a subject to be dealt with in a court of equity. The Court has frequently interfered to prevent a person having a particular interest in a lease from taking a renewal for his own benefit alone, declaring him a trustee for all the parties interested in the old lease: *Palmer v. Young* (a), *Keech v. Sandford* (b), *Blewett v. Millett* (c), *Featherstonhaugh v. Fenwick* (d). Even where a fresh lease has been granted after the expiration of the former lease, that fresh lease has been affected with the trust: *Griffin v. Griffin* (e), *Fitzgerald v. Fauconberge* (f), *Moody v. Matthews* (g), *Maxwell v. Ashe* (h).

It is submitted, that these authorities would be conclusive upon the question as between the defendant and a devisee of James Lugar. Then, is the case different as between the defendant and the plaintiff, who claims under Abraham Newman? That turns upon the question of notice. The plaintiff has the legal estate, and that must still be affected by all equities originally attached to it, unless he can protect himself by shewing that he is a purchaser of that legal estate without notice. Now it is clear that Newman must have had notice of the trust. The leases from the year 1777 to the year 1817 are in evidence. They are of course all renewals, and are granted in consideration of the surrender of the former leases. The renewed lease obtained by Newman recites the will of James Lugar; a circumstance which alone is strong to shew that Newman had notice of James Lugar's

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(a) 1 Vern. 276.

(b) Sel. Ca. Ch. 61.

(c) 7 Bro. P. C. 367, Toml. ed.

(d) 17 Ves. 298.

(e) 1 Sch. & L. 352.

(f) Fitzgib. 207.

(g) 7 Ves. 174.

(h) Id. 184, cited.

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title. Another strong circumstance is, that a suit instituted for these very tithes by Abraham Newman and Marshall Lugar, in 1787, was abandoned, after the same defence was made by answer as is now made. The observation that it would have been incumbent on the defendant, if he had filed a cross bill, to contribute to the expenses of the renewal, is fully answered by the cases of *Moody v. Matthews* and *Maxwell v. Ashe*; and is evident, from the wording of the will, that the testator must have intended that James Lugar, and those claiming under him, should free the Badley Hall farm from tithes at their own expense.

Mr. *Richards*, in reply.—The cases of renewal by a bare trustee, or by a party who is compellable to renew, differ widely from the present case. Where a person is a bare trustee under a will or settlement, it is his duty to renew for the benefit of the *cestui que trusts*. The cases of *Fitzgerald v. Fauconberge*, and *Montford v. Cado-gan* (a), were of that class. In *Moody v. Matthews*, the party who renewed, and who was declared a trustee, might have been compelled, by a court of equity, to renew. The party claiming the benefit of the renewal was the purchaser of an annuity. The purchase deed contained an express covenant that the annuity should be charged upon the leasehold tithes. The husband of the grantor having after her death taken a renewal of the lease with his own money, the question was, whether the annuity was a charge upon the renewed term, and Sir William Grant held that it was; being of opinion that the husband stood in no better situation in regard to the annuity than the wife, and might have been compelled by a court of equity to renew the lease for the benefit of the annuitant. A renewed lease is held for the benefit of third persons,

(a) 17 Ves. 485.

when either by law or by contract the party who holds it might have been compelled to renew it for their benefit. But here there was nothing in the will shewing that it was compulsory on James Lugar to renew the lease. All that he and his executors had to do, was to keep the property free from such tithes as should be payable during the existing lease. The words "payable to the said owner or occupier," refer to the then owner or occupier of the parsonage and tithes. There was no covenant by James Lugar to renew, and consequently there is no breach of trust in those who claim under him if they do not renew: *Capel v. Wood* (a). There is therefore no obligation upon them to keep this property free from tithes. To hold otherwise would be to sanction a perpetuity.

Upon the question of notice, it is clear that the Court cannot presume notice against a legal claim. The defendant says that the plaintiff must be presumed to have had notice of William Lugar's will—but it is difficult to say on what ground; for, upon the purchase by Abraham Newman, it was not necessary to see the trusts of William Lugar's will. James Lugar's will contains no reference to that of William.

ALDERSON, B.—This case has been brought before the Court on admissions—the question being, whether the plaintiff is entitled to the tithes of defendant's farm, called Badley Hall. The defendant sets up as a defence that the plaintiff is not entitled to maintain the present bill, inasmuch as he must be considered in equity as the trustee for the defendant of the tithes of this farm.

It appears that William Lugar, in 1752, was seised in fee of the farm in question, and entitled, as *cestui que trust* (James Lugar being his trustee), to the interest in a lease for three lives of the tithes of the parish of Ardleigh, in

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(a) 4 Russ. 500.

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which the farm was situate, under the Archdeacon of Colchester. He made his will in 1752, devising the farm in moieties to different persons, and bequeathing all his rights and interests in the parsonage and tithes to James Lugar, his trustee, on condition that James Lugar, his executors, administrators, and assigns, owners or occupiers thereof, should at all times after his decease free the farm from all tithes.

The defendant, it appears, has by several mesne conveyances, which it is not necessary to state, became entitled, through the devisees under William Lugar's will, to the Badley Hall farm.

James Lugar, to whom the lease of tithes subject to the above condition was bequeathed, died in 1755, leaving this property to his four sons, James, William, Francis, and Philip. In July, 1755, a new lease was obtained by the four sons, and one life having dropped, Philip Lugar's life was added to those of Freeman and Bradstreet, who were two of the original nominees. In July, 1761, a new lease was granted to Francis Lugar, (one of the four sons), for the lives of Bradstreet, Philip Lugar, and James Lugar. In October, 1777, a new lease was granted to William Lugar, Philip Lugar, Marshall Lugar, and William Harman, for three lives: namely, Philip Lugar, John Eyre, and Frederick Eyre. It would appear, therefore, that all the lives upon which the estate depended when the testator died, had expired at some period between 1761 and 1777.

Afterwards, Abraham Newman having purchased three-fourths of this lease in May, 1782, the whole was assigned to him, (in trust, however, as to one-fourth, for Marshall Lugar); and having done this, he let the whole to Marshall Lugar, as tenant thereof. Soon after this a suit was commenced by Marshall Lugar and Abraham Newman against Ann Lugar, the occupier of Badley Hall farm, for the recovery of the tithes thereof; but after answer put in, stating

the above facts, the suit was abandoned. In the year 1799, Abraham Newman died, bequeathing all his interest (three-fourths) in these tithes to the plaintiff, who, in 1817, having purchased of Marshall Lugar the remaining one-fourth part, became entitled to the whole; and being so entitled, obtained a renewal of the lease from Dr. Jefferson, Archdeacon of Colchester, in December, 1817. That lease is now in force.

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Now, the first question is, what is the true construction to be put on William Lugar's will? Is it to be considered as a bequest on condition that the estate should be free from tithes during the continuance of the lease for the lives then in being, or is it to be taken in a larger sense? The condition is, that his executors, administrators, and assigns shall at all times free the estate. These words are general, and not qualified as to time; and when we consider the nature of this property, and the customary mode of renewing on the falling in of each life, I cannot entertain any doubt that the intention of the testator was, that so long as these tithes should belong to James Lugar, and those claiming under him, so long Badley Hall should be free and discharged of tithes; and that if he or they assigned the lease, they should do so subject to the same condition. This, then, gave the proprietors of Badley Hall an exemption from tithes during the continuance of the lease, and a special interest in the renewal of it.

Now, according to a class of cases, beginning with *Rawe v. Chichester* (a), it is laid down, that when a lease of this sort is renewed, it is to be considered as a continuation of the old lease, and all who had a special interest in the old lease take the same special interest in that which is renewed. It is clear, therefore, that if the plaintiff was a volunteer claiming under James Lugar, he could not maintain the present suit; and, according to the cases of *Max-*

(a) 1 Bro. C. C. 198, n.

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well v. Ashe and *Moody v. Mathews*, the defendant is not even bound to contribute towards the renewal fines. Indeed, I think that, independently of those authorities, the principle alone ought to have led me to that conclusion: for if a beneficial interest is given and accepted on the condition of an exemption at all times from tithes being conferred on this estate, why should I add a restriction on that condition not mentioned by the testator, of a contribution to future fines? If this condition, taken *simpliciter*, made the bequest not advantageous, James Lugar might have repudiated it altogether.

But then it is said that the present plaintiff is a purchaser for valuable consideration, and without notice. No doubt he is a purchaser for valuable consideration, for Newman, under whom he claims part, was a purchaser for valuable consideration, and he is himself the purchaser for value of the remainder. But here, no tithes were ever collected from this estate, either between 1752 and 1782, or between 1782 and the present time. It seems to me that that fact alone ought to have put the parties on making inquiries, independently of the recitals in the deeds, which are also strong evidence on this subject. I think, therefore, that the parties here must be considered as purchasers with notice.

It is not necessary to determine what would have been the result in case I had come to a different conclusion as to the fact of notice. It is quite sufficient that these parties stand in the same situation as parties claiming as volunteers under James Lugar would have done. I think, therefore, that the same result must follow as was the case when the suit was instituted by Abraham Newman and Marshall Lugar, and that this bill must be dismissed with costs.

Decree accordingly.

App. on appeal. 4 Cl & Fin 570

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NEATE v. LATIMER.

July 1st.

^{27. 341}
THE plaintiff claimed to be a judgment-creditor of the Duke of Marlborough, who was a defendant to this suit, by virtue of a bond executed to him by the Duke, in the year 1815, for the sum of 7000*l.*, upon which the plaintiff obtained a final judgment, in the year 1818, for 14,000*l.*, debt, and 158*l.* 1*s.* damages. That judgment was suffered to abate, but was revived in the year 1821, and kept on foot; and in the month of November, 1824, the plaintiff sued out execution upon it. Under that execution, the Sheriff of Oxford seized various goods and chattels at Blenheim, of which the defendant Latimer claimed to be the lawful owner under divers bills of sale, assignments, and other instruments, which he alleged to have been executed to him for a valuable consideration by the Duke and other persons authorized by him. Latimer, in consequence of this seizure, brought his action against the sheriff, and obtained a verdict. The plaintiff, however, in 1833, again sued out execution on his judgment, and upon the sheriff making a return of *nulla bona*, the plaintiff, in February, 1834, brought his action against the sheriff for a false return.

Where, as a security for money advanced from time to time to A., the creditor of A. had taken various bills of sale and assignments of A.'s personal property, but had left A. in the visible user and enjoyment of that property; upon a bill filed by a subsequent judgment-creditor of A., impeaching the prior securities for fraud:—*Held*, upon motion before hearing, that the plaintiff was entitled to the production of the several bills of sale and assignments.

In May, 1835, which was pending the action against the sheriff, the plaintiff filed his bill in this Court, praying that it might be declared that all the bills of sale and assignments of the goods and chattels in and upon the mansion-house and premises at Blenheim, made and executed by the Duke of Marlborough to the defendant, were void as against the plaintiff, and that the same might be delivered up to be cancelled, and an account might be taken of what was due to the plaintiff upon the judgment, and for his debt, damages, and costs; that an account might also be taken of the pecuniary dealings and transactions between the defendant and the Duke of Marlborough since 1823,

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and in case a balance were found due to the defendant, that an inquiry might be directed whether he had any lien or security for it upon all or any of the goods and chattels at Blenheim, the plaintiff offering to pay what, if anything, might be found due on such security; that the goods and chattels in question might be sold, and that out of the proceeds the plaintiff might be paid the amount of his debt, costs, &c., and what, if any thing, he might pay to the defendant; and also that the Duke of Marlborough's equitable interest in the property might be applied, as far as it would extend, to the purposes of this suit.

The bill charged, that in the year 1824, and in several succeeding years, several bills of sale and assignments of part of the goods and chattels, personal estate and effects, in and about the mansion and premises at Blenheim, were executed to the defendant Latimer, by or under the directions of the defendant, the Duke of Marlborough; that the same were respectively dated, &c., and were made and executed to the defendant Latimer without any consideration having been paid or given by him for the same; that no part of the said goods &c. had ever at any time been removed from the said mansion-house, but that the Duke of Marlborough had, ever since the said bills of sale and assignments were made, continued to use and did then use the same as his own absolute property; that all the said bills of sale and assignments then were, and always had been, void and of none effect in equity against the plaintiff; that the defendants had in their custody or power, and ought to set forth a list or schedule of the aforesaid deeds, bills of sale, &c., and leave the same in the hands of their clerk in Court for the usual purposes.

The defendant Latimer, by his original answer, admitted that he had in his custody, possession, or power, the several bills of sale and assignments mentioned in the bill. He also admitted that the defendant, the Duke of Marlborough, had, ever since the said bills of sale and assign-

ments were made, continued to use, and did then use, the goods and chattels which were in and upon the mansion-house at Blenheim ; but he denied that they were used by the Duke as his absolute property, because they had ever since been and were then in the possession of one Richard Wilson, who was his, the defendant Latimer's, servant and agent. He further stated that the bills of sale and assignments were duly executed by all proper parties for a full and valuable consideration, and insisted that the same were his title-deeds ; and that, as such, he was not bound to produce them, but that upon payment of the sum of 8000*l.*, which he alleged to be the amount of his debt, he was ready and willing to deposit them in Court.

Exceptions having been taken to this answer for insufficiency, and those exceptions having been allowed, the defendant put in a further answer, to which he annexed two schedules, the first of which contained a statement of the several bills of sale and assignments.

The plaintiff now moved for the production of the bills of sale, assignments, and other legal instruments admitted by the answers of the defendant Latimer to be in his possession.

Mr. Temple and Mr. Ellison for the motion.—The rule that a purchaser for a valuable consideration without notice cannot be compelled to discover his title-deeds, does not extend to the mortgage or purchase deed itself: *Ex parte Caldecott* (a). The defendant insists that he is a *bond fide* mortgagee, and has a lien on this personal property for the amount of his advances. If that be so, the Duke of Marlborough would have a right to inspect the deeds himself, in order to know the amount due from him, and consequently a judgment-creditor of his stands in the same situation. A mortgagee never can object to produce the

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mortgage deed. If the plaintiff amended his bill, he might compel the defendant to set out the deeds *in hæc verba*, which would only be creating useless expense. If the deeds are produced, it will appear in the action against the sheriff what goods are not covered by these securities. Looking, however, at the defendant, not as mortgagee, but as claiming the goods under the bills of sale, we seek to impeach his securities for fraud, and on that ground have a right to their production. In *Beckford v. Wildman* (a), Lord Eldon says, "that where the object of the suit is to destroy the deed, the plaintiff has a right to have it produced." In that case, the motion was not acceded to as being unusual in point of form, but the rule of practice, as laid down by Lord Eldon, is undisputed: *Balsh v. Symes* (b). In *Kennedy v. Green* (c) it was held, that a party who alleged himself to be a purchaser for a valuable consideration without notice of fraud was bound to answer all the allegations of the bill tending to shew that he had such notice, and not having so done, he was ordered to produce the purchase deed. Here, the defendant, in answer to a variety of questions relative to the consideration given for the assignments, simply alleges that he gave a valuable consideration for them. That is not a sufficient answer to a bill charging want of consideration, and, on that ground, the order for production should be made.

Mr. Simpkinson and Mr. C. Romilly, contrà.—The case of *Ex parte Caldecott* does not decide that a deed of conveyance to a party is not his title-deed. The principle of that case is, that in consequence of the privity of contract between the mortgagor and mortgagee, the mortgagor has such an interest in the mortgage deed as to be entitled to call upon the mortgagee to produce it. The mortgagor's interest appears upon the face of the deed, and the mort-

(a) 16 Ves. 438.

(b) Turn. & Russ. 87.

(c) 6 Sim. 6.

gagee is his trustee. The plaintiff, however, is not in the situation of a mortgagee; and feeling that difficulty, he treats the bill in two different characters—first, as a bill to redeem, and next as a bill to set aside a conveyance for fraud. He asks that the bills of sale may be declared void, and yet, that the Master may inquire whether the defendant has any lien. [The *Lord Chief Baron*.—The plaintiff asks for that in case the deeds are found valid.] He cannot redeem at all, so long as this imputation of the deeds remains on the record. The main object of the bill is clearly to impeach these securities, and taking it in that light, this case differs materially from those which have been cited. In those cases the bill was filed by a party to the instrument: the party himself impeaching his own instrument. But it would be a very different thing to say that a party is entitled to call for the inspection of the instrument for the benefit of third persons. In *Beckford v. Wildman*, all that Lord *Eldon* said he could do was to order the deed to be produced at the hearing. [The *Lord Chief Baron*.—The object there was not to impeach the deed, but to take an account.] Then, what was said in *Balsh v. Symes* was merely a loose dictum, which, though cited as authority in the subsequent case of *Tyler v. Drayton* (a), was not acted upon. In the latter case, which was a bill to set aside a conveyance for fraud, Sir *John Leach* refused to order the production of the instrument. [The *Lord Chief Baron*.—The purchase deed there could have no relation to the plaintiff's title.] In *Kennedy v. Green*, the existence of the alleged indorsements on the deeds not being denied by the defendant, the Court treated the case as one of suspicion, and as warranting a departure from the general rule.

Admitting that, as a mortgagor or judgment-creditor of the Duke of Marlborough, the plaintiff might, under some

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(a) 2 S. & S. 309.

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circumstances, have a right to the production of these instruments—can he insist upon such a right while claiming, not under, but against the Duke? He claims by an adverse title, alleging that he has obtained a judgment which gives him a lien on the property. The cases upon the subject depend upon contract or derivative contract: *Sparke v. Montriau* (a), *Postlethwaite v. Bligh* (b).

The LORD CHIEF BARON.—The general rule upon this subject is liable to so many exceptions, that it is difficult to know to what cases it may be applied. The general rule is, that a party is not bound to produce his own title-deeds for the inspection of his opponent; yet, if the party seeking their production has an equal interest in them with the holder, that gives him an equal right to their production. Again, a party is not bound to produce title-deeds which are only collateral to the title of the party seeking their production. A mortgagee generally is not bound to produce his title-deeds without payment of the money due to him; but, suppose the mortgagor says that the mortgage deed has been falsified, and that a larger sum has been inserted in it than he ever received or intended to receive: if he impeach it for fraud, in this manner, he is entitled to have that question tried before he pays even the sum which he admits to be due. But it follows, that unless he has the inspection of the deed he may fail in his object, because he may wish to take advantage of some particular part of the instrument. It is clear, that if he wants to know what sum is due, he is not bound to trust to the oath of the mortgagee. So that, in many cases, it depends upon the particular object which the plaintiff seeks to accomplish, whether he has a right to inspect the deed or not.

Now, it would be preposterous to say that a first mortgagee might be called upon by the second to produce his

(a) 1 Y. & C. 103.

(b) 2 Swanst. 256.

mortgage, in order that upon a bill for foreclosure the second mortgagee might have the advantage of impeaching the title of the first. But suppose some fraud to have existed between the first mortgagee and the mortgagor, and that in consequence of their representations the second mortgagee was prevailed upon to advance a larger sum than he otherwise would have done; if he afterwards filed his bill for a discovery of the fraud, and made the first mortgagee a party to the bill, unless the latter made a perfect discovery of those facts, how could a court of equity administer justice without calling upon him to produce the deed? The second mortgagee might say to the first incumbrancer, "When I advanced my money, 5000*l.* was represented to be due to you, and now it turns out to be 10,000*l.*: there must be some collusion between you and the mortgagor, and I desire discovery." It is possible, therefore, to suppose a case where a court of equity would call upon a party to disclose that deed from which evidence of the fraud might be obtained. In the present case I do not see in what way a court of equity could relieve the plaintiff, unless the deed were brought into Court; and as it must be produced at some time or other, why not before the hearing?

It was said by Mr. *Romilly* that no imputation of fraud rests against the defendant Latimer. Is that so? He denies fraud generally; but the question is, whether the facts on which the allegation of fraud is founded are denied. The important question is, whether Latimer is *bond fide* preventing the Duke of Marlborough from having the personal enjoyment of the goods and chattels at Blenheim, the possession of which by the Duke is a badge of fraud as between him and Latimer. The possession of goods not going with the title, has always been admitted as a badge of fraud. That has been evaded in this case by putting a person in possession. Why is that person in possession of the goods at Blenheim, except for the purpose of saying

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that the Duke is not in possession? But the Duke has the substantial benefit of the goods: he has the entire usufruct of the whole. How is that consistent with the allegation that Latimer is in possession of the whole? The case is not free from suspicion. The plaintiff says—"The fact of the Duke of Marlborough residing at Blenheim in possession of goods upon which I have a right of execution, as the fruit of my judgment, while at the same time another party alleges that he has the possession of them, is itself a circumstance which demands inquiry; therefore I am not bound to take the oath of Latimer as to the claim which he sets up. I require an investigation of the amount of that claim, and the circumstances in which I find the goods placed justify the inquiry." If they had been in the possession of Latimer subject to the claim of the Duke of Marlborough to redeem, it would have been the ordinary case of the first mortgagee insisting upon his prior right to be redeemed. But under the circumstances of this case—one man having the goods and another the title by assignment—the plaintiff may say, "I am not bound without further inquiry to pay the 8000*l.*, and investigate the matter afterwards. Why should I be liable to the necessity of filing another bill to have the money refunded?"

Upon the whole it appears that the plaintiff has a judgment which would operate upon these goods except for Latimer's claim. A suspicion naturally arises as to the nature of that claim from the situation of the goods. If that situation is a sufficient badge of fraud, it is a sufficient cause for investigation. I do not mean to say that the case is conclusive against the defendants, but I think there is sufficient to induce the plaintiff to say that he ought not to be bound by Latimer's assertions without production of the deeds. If the case is an honest one, I see no reason why he should not produce them. I do not say it is not an honest case, but only that there is no reason why he should not produce the deeds if the case is

free from suspicion or taint of fraud. He is bound, however, to produce them on the ground that the plaintiff, having an interest in these goods, and having a right to redeem Latimer's mortgage upon payment of the full amount due to him, has an interest in paring down Latimer's title, and in reducing it to its proper dimensions before he purchases it, and that it is not a case in which Latimer can say, that he is a mortgagee with respect to whom the plaintiff stands in the situation of a mere stranger, or that the plaintiff must satisfy the amount of his claim before he can ask for the production of these deeds. That, I think, is not his case. The deeds therefore must be produced.

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Order accordingly.

[Affirmed in Dom. Proc. April 25, 1837.]

WILLIAMS v. The Bank of ENGLAND.

Nov. 5th.

ON the 11th August, 1836, the plaintiff obtained from this Court a writ of *distringas* to restrain the transfer of 116*l.* Long Annuities, standing in the name of John Calverly and his wife. On the 14th October following, Calverly made an application to the Bank for a transfer of the stock; upon which the Bank gave notice to the plaintiff, that unless a bill was filed, and an injunction obtained to prevent the transfer of the stock, a transfer would be permitted. The plaintiff then, after ascertaining that the Lord Chief Baron was not in town, filed his bill in Chancery on the 17th October, and on the following day obtained an injunction from the Master of the Rolls.

Distringas obtained in this Court, followed by proceedings in the Court of Chancery, discharged with costs.

Mr. *Chandless* now moved, on the part of Mr. Calverly, that the writ of *distringas* might be discharged, and that

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the plaintiff might be ordered to pay the costs of issuing and discharging the same. He contended that obtaining a *distringas* in this Court, and following it up by proceedings in the Court of Chancery, was altogether irregular, and was in effect obtaining two injunctions. He cited *Fellows v. Bank of England* (a), and *Argent v. Bank of England* (b).

Mr. *Simpkinson* and Mr. *Rogers*, contra.—It is clear from the affidavits, that it was the intention of the plaintiff to file his bill in this Court, and that he was only prevented from so doing by the absence of the Lord Chief Baron. That distinguishes this case from *Fellows v. Bank of England*. There it appeared, from the plaintiff's own affidavit, that he obtained a *distringas* here with the intention of filing a bill in Chancery; and such a proceeding was looked upon by Lord *Lyndhurst* as an abuse of the process of this Court, and accordingly the writ was discharged. Here, upon receiving notice from the Bank, and learning that the Lord Chief Baron was not in town, the plaintiff could do no otherwise than file his bill in Chancery. Besides, this motion is altogether unnecessary, because the *distringas* is not in the nature of an injunction, but operates only as a notice to the Bank, which they may obey or not, as they think expedient. At all events, upon obtaining the injunction the *distringas* became a nullity. The plaintiff is a mere trustee, and ought not to be made to pay these costs.

Mr. *Chandless* in reply.

THE LORD CHIEF BARON.—I cannot agree that the *distringas* is a nullity. The question is, whether a party shall be at liberty to obtain the process of this Court, (the

(a) 1 Younge, 385.

(b) 1 Y. & C. 557.

effect of which would be, in particular cases, to give advantages to the plaintiff which he otherwise would not possess), for the purpose of filing a bill in another Court. If this Court were ancillary to the Court of Chancery for the purpose of holding property in security, it would be a different question; but where a *distringas* issues from this Court, it proceeds on the understanding that the party is going to carry on the proceedings here; and it was never intended that a party should have a *distringas* in the Court of Exchequer, in order to arrest property in the Bank of England, until he files a bill in the Court of Chancery. I cannot say but that there might be an extraordinary case where this practice might be departed from, as, for instance, the impossibility of obtaining an injunction from a Judge of this Court. In the absence of a Judge abroad, as in fact did happen in the early part of the vacation, such a proceeding would have been justifiable. I perceive by the affidavit, that though application was made at my house in town, it is not stated whether, in answer to the application, the party was not informed that I might be in town at any time within three hours, or that the party might have been with me within the same time; nor is it stated that the Master of the Rolls was regularly in town, or that his being in town was not accidental. If this practice were countenanced, it would follow, that unless the Judges of this Court were every day in town, a party would be at liberty to issue a *distringas* in the early part of August, and afterwards to file a bill in the Court of Chancery, and to abandon the proceedings in this Court. The complaint is, that a grievance is done by arresting the right to transfer this stock for seven days until the plaintiff can file his bill in Chancery. The process of this Court, in the first instance, effectually served the plaintiff; it gave him an opportunity of filing a bill, and he has acted against good faith to the Court of Exchequer after obtaining these advantages. I

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do not think, on the face of the affidavit, there was a sufficient excuse for applying to the Court of Chancery, and therefore I must grant the motion, with costs.

Distringas discharged, with costs.

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BLIGH v. BRENT.

(Before the LORD CHIEF BARON, PARKE, B., ALDERSON, B., and GURNEY, B.)

The shares in the Chelsea Waterworks Company are personal property, and will therefore pass by a will not executed according to the provisions of the Statute of Frauds.

Real property, held for the purposes of a trading company, is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern.

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TIMOTHY BRENT, being possessed of several shares in the Chelsea Waterworks Company, by his will, and two codicils thereto annexed, gave all his estate and effects absolutely to his wife, Margaret Brent, and appointed Margaret Brent and his nephew, W. B. Brent, his executrix and executor. Neither the will nor the codicils were executed so as to pass real estates of inheritance.

The testator died, leaving his wife and nephew surviving him, whereupon the plaintiff, as heir-at-law of the testator, brought his bill against the widow and the Governor and Company of the Chelsea Waterworks, charging that the shares in that company are in their nature real estates of inheritance in fee-simple, and that, as such, the shares held by Timothy Brent did not pass by his will, but descended to the plaintiff, as his heir-at-law; and praying an account of those shares, a declaration that the plaintiff was entitled thereto, and that his name might be inserted in the books of the corporation as the proprietor thereof.

Upon the death of the widow, the suit was revived against the testator's nephew, as the personal representative both of the testator and the widow.

The cause came on for hearing before *Alderson*, B., at the sittings after Trinity Term, 1836, when his Lordship was pleased to direct that the cause should be heard be-

fore the full Court, which was now done accordingly; the question being whether the shares so held by the testator descended as real estate to the plaintiff, as the testator's heir-at-law, or passed as personalty under the testator's will to his personal representative.

This question depended upon the construction of the Acts of Parliament and charters by which the Company was established, and is now supported. The statute 8 Geo. 1, c. 26, after reciting (amongst other things) that great advantages would accrue to the inhabitants of Westminster, "if new water-works were erected in convenient places for providing and supplying the said inhabitants with good and wholesome water from the river Thames, by one or more cut or cuts, to be made at any convenient place or places, between the grounds belonging to the Royal Hospital at Chelsea, and the houses or grounds commonly called the Neat Houses, in the county of Middlesex, into canals and ponds proper for receiving the same, and from thence to convey and raise such water into convenient reservoirs, to be erected or made at any place or places, between the place called Oliver's Mount and Hyde Park, for the purposes of this act,"—enacts, that certain persons therein named "shall be commissioners, undertakers, and trustees for designing, carrying on, and effecting the purposes aforesaid, and for directing, ordering, appointing, and making such water-works, and for maintaining, preserving, and supporting the same; and the property thereof shall be and is hereby vested in the said commissioners, undertakers, and trustees, and their successors."

The fourth section gives power to his Majesty, by letters patent, to incorporate the commissioners, undertakers, and trustees appointed by this Act, by the name and title of the Governor and Company of the Chelsea Water-Works, and enacts, that "they and their successors, by the name aforesaid, shall be able and capable in law to

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have, purchase, receive, enjoy, possess, and retain to them and their successors, messuages, lands, tenements, rents, and hereditaments of what kind, nature, or quality soever, not exceeding 1000*l.* per annum in the whole; and also to sell, grant, demise, alien, or dispose of the same or any part thereof," &c.; "and to do and execute all and singular other matters and things by the name aforesaid, that to them may or shall appertain to do, with such powers and clauses as shall be requisite and necessary for erecting, preserving, and supporting the said waterworks, and all necessary ways, passages, and water-courses thereto belonging from time to time; and to be under such rules, qualifications, and appointments as his Majesty, his heirs or successors, shall think necessary or reasonable to be inserted in any such letters patent; and that it shall and may be lawful to and for his Majesty, his heirs and successors, by such charter of incorporation, to empower such corporation and their successors to make reasonable laws, constitutions, orders, and ordinances from time to time for the good government of such corporation."

The fifth section enacts, that "it shall be lawful for the said commissioners, undertakers, and trustees, and their successors, to open, dig, cut, make, erect, raise, and from time to time to repair, preserve, and maintain, alter, scour, and cleanse all such sewers, trenches, water-courses, canals, water-works, pits, dams, banks, walls, arches, sluices, flood-gates, engines, pipes, cisterns, ponds, and other works, devices, and buildings which shall be made for conducting, drawing, or conveying to the places aforesaid, or for using there all such waters for the purposes aforesaid, through or under any roads, highways, or streets, or in, through, under, or over any ground which shall be purchased by them for the purposes aforesaid, and to discharge or issue thereout such waters, and to make, have, and enjoy new ponds, or other receptacles for water, as occasion shall require, in convenient places,

in or near to the said city of Westminster, or the liberty thereof, for the purposes aforesaid."

The ninth section enacts, "that the said commissioners and trustees, and their successors, shall and may, from time to time, have free liberty, power, and authority, without molestation or disturbance, by their servants and workmen, to lay pipes from the said streets, passages, or common grounds or places in or about Westminster, and for that end to dig up the pavements," &c.

By the thirteenth section this act is to be deemed and taken to be a public act.

The charter of the company, after reciting the Act of Parliament, proceeds to give general powers to the commissioners, in words nearly similar to those contained in the fourth section of the act. It then establishes a governor, deputy-governor, and thirteen directors. It gives power to the governor and company, and their successors, to hold a general court so often as the governor, deputy-governor, and directors for the time being, or as ten other persons, who shall have in their own right ten whole shares a-piece in the joint stock of the company, shall in writing demand of the governor, deputy-governor, or any five or more of the directors; such court to treat and consult, or make and establish reasonable laws, orders, and rules concerning the affairs of the company, or for the good government thereof. By a subsequent section the charter gives power to the governor and company, and their successors, to elect yearly, on the 25th of March, a governor, deputy-governor, and seven directors, out and from the members of the company, and six more directors, from and among the last preceding directors of the said company, by plurality of votes of all such, who have, or shall have, in his or their own right, five whole shares in the joint stock of the said company, and are then capable to vote, as thereafter mentioned.

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By the eleventh and twelfth sections of the charter it is declared and provided, that each and every *twenty pounds*, which will be part of the joint stock, and no less, shall be and accounted one share therein, and that each member having in his or her own right five whole shares in the said joint stock, shall have in every general court of the said company one vote for the same; and each member having in his or her own right ten whole shares in the said joint stock, shall in every such court have two votes for the same; and each member having in his or her own right twenty shares in the joint stock aforesaid, shall have three votes in every such court for the same; and that no person shall have a vote in any such general court who shall be possessed or interested in his own name, or in the name of any other person or persons in trust for him, either solely or jointly, of any part or share of or in the joint stock of any other company, or undertaking, for raising or conveying of water to the cities of London and Westminster, or to either of them, or to the liberties of, or parts adjacent to the same, or to either of them.

The twenty-first section of the charter grants to the company "that they, the said governor and company, and their successors, shall and may have full, free, and lawful licence, power, and authority to take, have, purchase, receive, enjoy, and possess, to them and their successors for ever, any manors, lordships, messuages, mills, waters, streams, conduits, rents, services, reservoirs, lands, tenements, and other hereditaments whatsoever, so as the same do not exceed the yearly value of 1000*l.* above all charges and repairs, and also estates for life or lives, and for years, and goods and chattels of what value, nature, or kind soever, for the better carrying on and effecting the purposes in these our letters patent contained, not exceeding the value of the joint stock of the corporation hereinafter mentioned and limited, and to be taken and computed as part thereof; and also to give, grant, de-

mise, alien, assign, and dispose of such manors, lordships, messuages, mills, waters, streams, conduits, rents, services, reservoirs, lands, tenements, hereditaments, estates for life or lives, and for years, goods and chattels; and also to do and execute all such other lawful acts and things whatsoever by the name aforesaid, touching and concerning the powers, liberties, privileges, and purposes before mentioned."

The twenty-third section of the charter gives power to the company, "by subscription or contribution of their members and others, to make and raise a joint stock, not exceeding the sum of 40,000*l.* of lawful money of Great Britain, to be applied for the carrying on and effecting the purposes of this charter; and the same joint stock to order, manage, and conduct from time to time, for the purposes aforesaid, and to receive the benefit and advantage of the same, to the use of them the said governor and company, and their successors, according to such shares and proportions as they or any of them have or shall have therein; and all and every person and persons so subscribing and contributing any sum or sums of money to such joint stock, shall by virtue thereof become members of the said corporation, and shall be entitled to a share or shares in such joint stock equal to the sum or sums of money so by him or them actually contributed and paid in, and no greater, and shall be and are hereby enabled to sell, assign, and transfer the same or any part thereof to any person or persons, by transfer in the books of the said company, in such manner as shall be ordered, directed, appointed, and established in and by a general court of the said company, or by his or their last will and testament; and the person or persons to whom such assignments, or transfer or disposition by last will and testament shall be made, shall by virtue thereof become members of this corporation: Provided nevertheless, that no person or persons who hath or shall have any shares or part of the said joint stock, shall assign or transfer the same before or until such time as the said water

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shall be brought into the grand reservoir or reservoirs intended to be made at or near the said place called Oliver's Mount. Provided also, that no assignment or transfer be at any time made of any sum or sums, in the said joint stock, less than one whole share."

The twenty-eighth section of the charter provides, that for preventing the Governor and Company of the Chelsea Water-works from interfering with the business of the Bank of England, and dealing in any trade or merchandize, "the said corporation hereby established shall not at any time hereafter discount or deal in bills of exchange, or inland bills or notes, nor shall receive monies, or keep the accounts or cash of any person or persons, (other than their own proper monies, accounts, and cash, being the real produce of their joint stock or fund, or such monies as shall be paid to them for the purposes herein mentioned), nor shall deal in banking, or any ways use the banking trade or business, nor shall under their common seal, nor by their cashiers, officers, or servants, or any other person on their behalf, give or issue out any bills or notes payable upon demand for the loan of money, with or without interest, nor shall advance or lend any money at interest upon any account whatsoever, (except the monies arising out of or by the real produce of their own joint stock or fund, or to be received by them, as hereinbefore mentioned), nor shall by way of trade or merchandize, directly or indirectly, buy, or sell, or deal in any bullion, gold, or silver, or any goods, wares, or merchandizes."

By a subsequent charter of King George the Second, power was given to the company to increase their joint stock, and it was declared that the contributors to the additional stock should be entitled to shares proportioned to their contributions, and should be enabled to assign the same "in such manner as any share or shares in the present joint stock of the said company can or may be assigned or transferred."

By the stat. 49 Geo. 3, c. 157, additional powers were

given to the Company for the purchase of lands near the River Thames, and in regard to freeholds, a form of conveyance is prescribed, by which the vendors grant and release to the Governor and Company of Chelsea Waterworks all their right, title, and interest in and to the conveyed premises, to hold to the said governor and company, and their successors for ever.

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Mr. *Simpkinson*, Mr. *Creswell*, and Mr. *Toller*, for the plaintiff.—According to all the decisions, property of this nature has been held to be real estate. The declaration contained in many of the acts of Parliament, that shares of this nature shall be deemed to be personal estate, is a strong argument to shew what in the contemplation of the legislature would have been the nature of these shares without that declaration. The present case is of a mixed complexion. Here the property is vested in the shareholders as a corporation, in trust for themselves individually, according to their respective interests. A general power is given to the company to bring water from the Thames *in perpetuum* by any means they may think fit. They had liberty to purchase freehold lands to an amount not exceeding 1000*l.* per annum, to purchase leaseholds, to lay pipes *alieno solo*, and through the medium of those pipes to supply *in perpetuum* the residents of Westminster with water. How, then, in any view is this a chattel interest in the corporation? It is a right given to them *in perpetuum*, and which, to say the least of it, savours of the realty. The right of laying down pipes *alieno solo* is, according to a vast number of cases, a right concerning land. That is determined by a numerous class of authorities, in which the rateability of occupiers of lands has been discussed. In the case of *Rex v. Corporation of Bath* (a), the nature of this sort of property was much

(a) 14 East, 609.

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gone into, and Lord *Ellenborough* said: "I confess I have great difficulty in distinguishing between the case of water collected in a trunk or reservoir so many yards wide, or in pipes so many inches wide, each being attached to the soil." *Bayley, J.*, also said: "The reservoir with the water would all descend to the heir." *Rex v. Rochdale Waterworks Company (a)*, *Rex v. Brighton Gas Light Company (b)*, and *Rex v. Chelsea Waterworks Company (c)*, are also strong authorities to shew that these pipes and reservoirs constitute an interest in land. It is only on that ground that the rates could be supported. *Negus v. Colter (d)* is an analogous case. What, then, is the extent of interest which the company has? An estate vested in them and their successors for ever; which constitutes in them an estate in fee-simple. If so, how is it possible to contend successfully that, the company being trustees for the shareholders, the interest of the *cestui que trusts* is not co-extensive with the legal interest of the trustees? The cases on the New River shares go far to decide the present question. The New River was established by stat. 3 Jac. 1, c. 18. By virtue of that act the city of London had a mere right to cut *alieno solo*: the property in the land was reserved to the owner. It was under that act that the powers of the city were regulated and the shares held. The other act relating to the New River is the 4 Jac. 1, c. 12. It seems only to give the city a liberty to erect a trunk or vault. Now, it is well known that Sir Hugh Middleton obtained a conveyance from the city of London of the right given to them by that act. The conveyance was to him, his heirs and assigns. He commenced making the cut, and died, and the right became vested in a variety of persons. The proprietors have since

(a) 1 M. & S. 634.

(c) 2 Nev. & Man. 765; 5 B. &

(b) 5 B. & C. 466; 8 D. & R. Ad. 156.

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(d) Ambl. 647.

been incorporated. The decrees pronounced upon the New River shares, since the company have acted as a corporation, will bear upon this case. A leading case upon the subject is *Townsend v. Ash* (a), which not only supports the proposition that New River shares are real estate, but is also an authority for the mode of proceeding in this case. [The *Lord Chief Baron*.—There the decree would have been the same if it had been personal property]. The case of *Drybutter v. Bartholomew* (b) is an express decision that a share in the New River Company is real estate. In *Lord Stafford v. Buckley* (c), Lord Hardwicke says, that “the case of the New River Company was one of so much land *aquâ coopert*, but there was no act of Parliament altering the nature of them, and they are forced to levy fines in all the counties through which the river runs.” [Parke, B.—Was there a charter at that time?] Long before that time, namely, in 17 Jac. 1. *Lord Sandys v. Sibthorpe* (d), and *Swaine v. Falconer* (e), are authorities to the same effect. Analogous to these is the case of *Buckridge v. Ingram* (f), relative to the shares in the Navigation of the river Avon. [Parke, B.—Was that the case of a corporation?] It was not so. The judgment of the Court, however, did not proceed on that circumstance, or upon the stipulations and usage between the parties, but upon general principles of law. “I have no difficulty,” said the Master of the Rolls, “in saying, that wherever a perpetual inheritance is granted, which arises out of lands, or is in any degree connected with, or, as it is emphatically expressed by Lord Coke, exerciseable within it, it is that sort of property the law denominates real, and cannot pass by a will without three witnesses.” Another case to the same effect, with reference to navigation shares, is that of

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(a) 3 Atk. 336.

(b) 2 P. W. 127.

(c) 2 Ves. sen. 182.

(d) 2 Dick. 545.

(e) Show. P. C. 207.

(f) 2 Ves. 652.

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Howse v. Chapman (a), and the principle of all these cases was adopted by Sir John Leach in *Ex parte The Vauxhall Bridge Company* (b). That was a question as to whether certain shares in the Vauxhall Bridge Company, (then being a company incorporated), held by an individual shareholder, who afterwards became bankrupt, were within his order and disposition, and Sir John Leach held that they were real estate, and therefore did not come within that clause of the Bankrupt Act. This decision, it is true, might be incorrect, because the act of Parliament constituting the company contained an express provision that the shares should be personal estate. That clause, however, was overlooked by counsel on both sides, and the case was decided as if there was no such clause. In the subsequent case of *The Lancaster Canal Company* (c), the Court came to the contrary conclusion, on the ground of the express words of the act.

Upon these authorities, it is submitted that the shares in this company are real estate. But admitting, for the sake of argument, that a fractional part of the property held by the company is personalty, are not these parts, regard being had to the nature of the undertaking, mere adjuncts to the realty? The undertaking is, perpetually to supply with water. The rents to be received are to be paid *in perpetuum* to the undertakers. How can it signify whether some of the component parts of the undertaking consist of personal estate? It cannot be carried into effect except through the instrumentality of real estate. '[Parke, B.—Does your observation as to the personalty apply to leaseholds?] There is no leasehold property. The shares, therefore, are in an undertaking constituted mainly of real estate. These shares are, by the terms of the charter and the act of Parliament, indivisible. No person is to be at liberty to convey less than one share; and if so, you can—

(a) 4 Ves. 542.

(b) 1 Glyn & Jac. 101.

(c) Mont. & Bligh, 94.

not separate the realty from the personality. [*Parke, B.*—It does not follow that the law may not separate them. The clause which you allude to applies only to voluntary transfers. They are like the transfers under the Ship Registry Acts]. The aggregate of the property, even if it consist both of real and personal parts, is real. It consists chiefly of the power of laying down pipes, and of lands which have been actually purchased in fee. That property is, by the express words of the act and of the charter, held *in perpetuum*. If that be so, how can an individual purchasing a share in the company take any other interest than what they possess? [*The Lord Chief Baron.*—Though the shareholders may have the profits, the corporation may have the interest in the land, and not the shareholders. *Parke, B.*—Suppose lands to have been purchased for the purpose of an undertaking, and to have been conveyed to certain parties, who execute a deed of trust, upon trust to divide the surplus profits among the original subscribers; would their having the surplus profits give the original subscribers any estate in the land? It appears to me that the company are as much distinct from the proprietors of shares as one man is from another]. The plaintiff is not driven to that dilemma. The very possession of a share makes a man a member of the company. [*Alderson, B.*—The charter says that he shall be entitled to a share in the joint stock. Upon looking back, you see what it consists of, namely, the land which they buy, and also the goods, chattels, and money. *Parke, B.*—The corporation is separate from the members. If the stock were assigned to a third person as trustee, he would have the same interest as the corporation. All the subscribers have to do is to receive the net profits]. The trust given to the corporation by section 23, is to raise a joint stock, and “to receive the benefits and advantage of the same to the use of them the said governor and company and *their successors*, according to such shares and

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proportions as *they or any of them* have or shall have therein." The question is, who, under this clause, is to be "*the successor*," in the absence of any transfer or will under the act of Parliament. The property being principally real, why should the personal representative be the successor? There would be no difficulty in holding that the party who takes the real estate takes the personal as fixtures attached to the realty. In every joint stock company the shareholder has an estate of the same nature as the company. In all the cases which have been cited, that principle was taken for granted, and in the cases of real property the widow was held dowable. [The *Lord Chief Baron*.—If a joint stock company purchase property, each individual shareholder has an interest in it, but the moment the company becomes a corporation, the corporation has the property in trust for the individuals. That proceeds on the principle that a man cannot be trustee for himself. *Parke, B.*—The difficulty arises from confounding the corporation with the persons who take the profits: those persons have no right to anything but the profits]. It is submitted that there is nothing to limit their right to the surplus profits. In the case of the *Lancaster Canal Company (a)*, *Lord Lyndhurst* says: "The persons who are shareholders are absolute holders of the entire interest in the property, *whatever that is*." He added that in that case the legislature had declared it to be personal estate. The clause in the Bankrupt Act, as to "order and disposition," goes upon the supposition that the shares held by individuals partake of the nature of that property which belongs to the company. Applying that principle to the present case, the shares in this company must be considered real estate, and the testator's will, not being attested by three witnesses, will not be sufficient to deprive the plaintiff of his rights. This view is corroborated by the words of the charter. The company are thereby enabled to direct the proper form

(a) 1 D. & C. 420; *Mont. & Bligh*, 113.

of conveyance, but they cannot alter the nature of the estate, or the mode of devising it. It is not said that the shareholders may transfer their shares *to be held* as the company shall direct, but that they may transfer their shares in such manner as may be ordered by the company, or by his or their last will and testament. That must be a will and testament executed according to law. It might be necessary, for the sake of cheapness, to give the company a power of altering the form of conveyance, but that reason does not apply to wills, and there was no ground for depriving this property of the ordinary protection given to real property in regard to wills. Upon the whole, there is no reason, in the present case, to give the *cestui que trust* a less estate than his trustee has. *Prima facie* their interests are co-extensive in a court of equity; and if any distinction can be drawn on the ground that a corporation is the trustee in this case, that argument will equally apply to New River Shares. With respect to them, the land is conveyed to the corporation: yet it was never said that a shareholder in that corporation had not a fee simple.

The grounds of defence stated in the pleadings are threefold:—first, that the shares have since the establishment of the company been treated as personal estate; 2dly, that Sir Thomas Sewell, in a case of *Weekley v. Weekley (a)*, held that these shares were personal

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(a) ROLLS, 5th February, 1781.

Between JANE WEEKLEY, Spinster, Plaintiff;
And JANE ARABELLA WEEKLEY, Widow, Defendant.

George Weekley, by his will, dated the 22nd April, 1774, and attested only by two witnesses, devised certain real estate to the plaintiff, who was his only child, in fee, and bequeathed to her certain articles of furniture. He then "gave her also twenty shares in the Chelsea Waterworks." After giving various bequests to his relations and friends, and, among them, "to my cousin Walton ten shares of my Chelsea Waterworks;" and after devising certain real estate to the defendant, who was his wife, for life, with re-

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estate; and 3rdly, that in 1815, the plaintiff, as the representative of his father, who was a shareholder, obtained a transfer to himself of some of the shares as of personal estate. [*Alderson, B.*—The first and third objections will not avail the defendant]. Then, upon the case of *Weekley v. Weekley* it may be observed, that it is nowhere reported, nor to be found in any manuscript note. The facts of it, as far as they may be gathered from the Registrar's book, are complicated and perplexed, and the

mainder to the plaintiff in fee, he gave to the defendant "fifty shares in the Chelsea Waterworks, for life only, and to my daughter and her heirs for ever:" and he appointed the defendant his executrix.

The testator died, entitled to eighty shares in the Chelsea Waterworks. Upon his death, the plaintiff filed the present bill, insisting that his real estate did not pass by the will, but descended on her, subject to the widow's claim of dower, and charging that the shares in the Chelsea Waterworks were to be considered as real estate, and to be treated accordingly. The bill prayed (among other things) for an account of the produce of the Chelsea Waterworks shares, accrued since the testator's death, which had been received by the defendant, and that the securities for such shares might be delivered up to the plaintiff, or secured in court.

The defendant, by her answer, submitted that the Chelsea Waterworks shares were personal estate; and issue being joined, the parties went into evidence on the subject,

which consisted of the act of the 8th Geo. 1; a copy of the charter of the 9th Geo. 1; copies of the transfers of eighty shares from the testator, as executor of Thomas Weekley, to John Harbutt, and from John Harbutt again to the testator; and depositions of Mr. Stainsby, a director of the Chelsea Waterworks Company, and of Mr. Bligh, their secretary, as to the nature and mode of transfer of the shares.

"The cause was heard before Sir Thomas Sewell, M. R., and the decree (among other things) declared, "that the eighty shares in the Chelsea Waterworks, in the said testator's will mentioned, are to be considered as part of his personal estate, specifically devised by his will; and that the plaintiff is entitled to twenty shares thereof; and Frances Walton, in the said will called cousin Walton, to ten shares thereof; and that the defendant is entitled to the income of fifty shares thereof for her life only, and the plaintiff to the said fifty shares after the death of the defendant."

case seems to have been one of election, the plaintiff having accepted benefits under the will. Besides, the company were not parties to the suit, so that it is difficult to say how the Court could make such a decree in their absence.

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The *Attorney-General*, Mr. Boteler, and Mr. Prescott White for the defendants, the Governor and Company of the Chelsea Waterworks.—For 125 years these shares have been considered as personal property, and have in that character been disposed of *inter vivos*, and bequeathed by will. The only case of a dispute upon the point was that before Sir Thomas Sewell, in 1781. If these shares were now to be considered as real estate, so as not to pass by a will unattested by three witnesses, the greatest confusion and distress would arise. The correctness of the decisions on the New River Company and the Bath and Avon Navigation, are not questioned. Something, however, does depend on the intention of the parties and their acts. Where real property has been purchased for partnership purposes, it is for all the purposes of the partnership personal, and passes accordingly. In the case of the New River Company that rule did not apply, because, by the express words of the 3 Jac. 1, and of the charter, the shares were made descendible to the heirs of the parties interested. The grant was originally made to Sir Hugh Middleton, his heirs and assigns. So, in the case of the Bath and Avon Navigation, it is expressly ordained that “the share of a party dying shall descend and go to the heirs and assigns of the party so dying.” Upon this circumstance, and upon the usage and general understanding between the proprietors, the Master, in the case of *Buckeridge v. Ingram* (a), reported that those shares were in the nature of realty. Here the case has been directly

(a) 2 Ves. jun. 659.

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the contrary. It has been the invariable usage to assign the shares as personalty. In the first instance the company purchased a lease of certain lands for 99 years, and upon that land their works were erected. They held no freehold land whatever previous to the year 1729. Before that time these shares were personal. Every thing that they had was personal. In 1729, however, they purchased three acres of freehold, and from that time till 1735 they had only those three acres of freehold. Does the plaintiff mean to say, that if this company have a perch of land and personal property to the amount of 500,000*l.*, the latter is a mere schedule to the realty? In 1735 they purchased three acres, one rood more; and in 1793, six acres. These acres are no doubt realty, and are vested in the corporation. The question, however, in all these cases is, not what estate the corporation has, but what the individuals have. [The *Lord Chief Baron*.—The Bath and Avon case may be left out of the question, for the Duke of Beaufort was not a corporation]. In the present case five-sixths of the property of the corporation is personal. As far as the shareholders are concerned, it is attended with all the incidents of personalty. The company was constituted with a commercial intent; that is, for supplying Westminster with water, as it might with milk or any other commodity. Certain persons were to meet together to settle plans for their own advantage, and to contract with customers; they were to raise a stock of 40,000*l.*; that stock was to consist of money subscribed by the shareholders, for the purposes of this commercial adventure. The shareholders had power to transfer their shares—a power which they might have exercised before a single acre was purchased. The word “heirs” is not to be found, in relation to the shareholders, either in the statute 8 Geo. 1, or in the subsequent charters; and that distinguishes this case from that of the Bath and Avon Navigation. [The *Lord Chief Baron*.—In some of the older acts the word

"heirs" is used with reference to personal estate]. It is sufficient, however, for the purposes of this argument to say, that according to the cases on the subject real estate purchased for commercial purposes is personal, even if the legal estate is in the shareholders; and consequently that these shares would pass under a will, and *inter vivos*, as personalty. The question is, whether they pass under this will? It is said that they cannot, because the will is not executed so as to pass real estate. But when the situation of the words "last will and testament" in the twenty-third section is considered, coming as they do immediately after the words, "sell, assign, and transfer," &c., it seems clear that any will or testament, of which the Ecclesiastical Court would grant probate, would satisfy the words of this charter.

Under all these circumstances, how can it successfully be contended that these shares are realty? Reference has been made to the cases in which it has been held, that the occupiers of pipes are liable to rates. Under Lord Coke's definition the right of laying pipes may be a tenement, but it is only a tenement in the corporation. A share in the corporation is one thing; a tenement which is in the corporation is totally different. There is no authority for the proposition, that in a mixed fund that which savours of the realty gives a character to the whole. When the corporation was originally constituted, all that they could pretend to have as savouring of the realty was the power of laying pipes. It is not stated what their interest would have been, if all the landed property had been leasehold. It is clear, therefore, when all the circumstances of the case are considered, that the property of this corporation is to be treated like that of any ordinary mercantile partnership.

The law upon this point is perfectly settled. Whatever landed property the partnership acquires, whether freehold or leasehold, devolves in equity to the executors of

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the partners: *Phillips v. Phillips* (a). This does not alter the nature of the property to all intents and purposes, because the partners have or had lately the power of voting at elections. That was the case with the partners in Day & Martin's house. But the law presumes, that when partners lay out their money in landed property, they only intend to invest their money for partnership purposes, and when the partnership ceases the property returns to them in money. This principle is not adopted for the benefit of creditors, because, if a person trading singly buys real property, it descends to his heir, while the chattels go to his executor. The ground of the principle is the convenience of the partners themselves, and the partners may, if they please, waive the benefit of that principle by contract. If they take a conveyance of real estate in a form which shews they do not intend it to devolve to their executors, they can do so: *Balmain v. Shore* (b). If A. & B., partners, enter the freehold property in their books as partnership property, that will be evidence to shew that by contract it is partnership property. If they enter it half as A.'s property, and half as B.'s, then it is otherwise. The books speak of partners in trade, and some years ago there was a difficulty as to collieries being considered within that description; but now, if several parties take a colliery, the law considers it, whether freehold or leasehold, as partnership property: *Fereday v. Wightwick* (c). The observations of Sir John Leach in that case are not applicable to mines alone. Any other property in the nature of realty, as a farming lease, would come within the same rule: *Jeffereys v. Small* (d), *Elliot v. Brown* (e), *Jackson v. Jackson* (f), *Lake v. Wilkinson* (g). The Court cannot stop short of the proposition that upon

(a) 1 M. & K. 649.

(b) 9 Ves. 500.

(c) 1 Russ. & Mylne, 45; Taml. 250.

(d) 1 Vern. 217.

(e) 3 Swanst. 489.

(f) 9 Ves. 591.

(g) 3 P. W. 150.

the dissolution of a partnership carrying on a trade, and purchasing a farm as the means, the farm must be sold and the money divided between the partners. But, suppose fifty persons to be embarked in a trade, and purchasing land, and suppose the land to remain in the whole body; might they not agree that as to each particular share the executors should come in, and not the heir? Again, suppose a company incorporated to carry on a mere trading concern, and that by an act of Parliament they are authorized to purchase land to a certain extent, can it be contended that the shares do not go to the executors? Besides here the parties, from the beginning to the end of their act and charter, have bound themselves by words applicable only to personal estate. That is sufficient to make these shares personalty without any express words for that purpose. In *Jackson v. Jackson* (a), Lord Eldon held, that, from the manner of treating real property, it might by implication be considered partnership property. Here it is clear, from the acts and deeds of the parties, that this property is held for partnership purposes. That being so, the broad general rule of equity, already alluded to, must apply. That rule depends, not on any express contract between the partners, or upon any considerations as to the amount of partnership debts, but on general grounds of convenience. In *Phillips v. Phillips* it was contended, that this was a rule for the benefit of creditors only, and that as soon as their demands were satisfied the partnership property became liable, according to its nature, to the incidents of real and personal estate respectively: but Sir John Leach, in the course of his judgment, said, that he considered it settled that all property, whatever might be its nature, purchased with the partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have, to every intent, the quality

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of personal estate; and that the principle was not to be confined to the payment of the partnership demands. [The *Lord Chief Baron*.—You consider the holder of a Chelsea Waterworks share liable to the bankrupt laws]. This is an incorporated company, and expressly exempted from the operation of those laws; otherwise, under the more liberal construction of the bankrupt laws which now prevails, a shareholder would be so liable. The company buys the water, and manufactures it through the operation of philtres. A contract to supply water in pipes, is a contract to supply goods within the meaning of the bankrupt laws: *West Middlesex Waterworks Company v. Suverkropp* (a). The shareholder is a mere trader, and the real and personal property are the machines for carrying on the trade. The corporation holds them for the management of the concern, and the individual shareholders have only a right to a share of the net profits: *Ex parte Horne* (b). [Parke, B.—Your argument is, that the shareholder has no right to the specific profits, or to the possession of any part of the realty, but only to a share of the capital, according to the amount of his capital subscribed]. That is the argument now submitted to the Court.

With respect to the cases which have been cited for the plaintiff, that of the New River Company is totally inapplicable here; the form of its act and charter, and also of the original conveyance to Sir Hugh Middleton, being expressly applicable to the transfer of real property only. [The *Lord Chief Baron*.—It appears that the land in that case was not vested in the Corporation of London at all, but in the individuals. The corporation was incidental to the purposes of management only, and was not seized of the land. That explains the observation of Lord *Hardwicke*, which at first appears extraordinary, as to the pos-

(a) 4 C. & P. 87.

(b) 7 B. & C. 632.

sibility of the proprietors bringing ejectments (a). *Parke, B.*—The Corporation of London took no estate, but only a power, the effect of which would be to vest the real property in the individual members]. Then, as to the Vauxhall Bridge Company (b), admitting the decision of Sir *John Leach* to be correct, it only goes to the extent that the shares in that company are not within the clause of “order and disposition.” It does not necessarily follow that they are real estate, inasmuch as leaseholds are not within that clause. Upon the whole, the present case must be governed by that of *Weekley v. Weekley*, which is a full, precise, and explanatory decision upon the subject.

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Mr. *G. Richards* and Mr. *Stevens*, for the defendant William Brent.—Considering the frame of these documents, and the mode of dealing by the company, it is not incumbent on the defendant to shew that the shares have been expressly converted into personalty; it lies on the plaintiff to shew the contrary. It is impossible to say that the proprietors could bring ejectments for their shares. The argument that the shares ought to partake of the general nature of the property, is totally untenable, and, if adopted, would lead to great absurdities.

This is a trading adventure, in which the shares are personalty, though existing *in perpetuum*. In *Lord Stafford v. Buckley* (c), Lord *Hardwicke* held, that the mere circumstance of an annuity being charged as personalty *in perpetuum* would not make it in the nature of realty. This case is stronger in favour of the personal representative than are cases of that class. In that case there was nothing on the face of the instrument to shew why it should go as personalty; but here the party takes an assignment to him, his executors, administrators, and assigns, which shews, not merely a contract between him and the other

(a) 3 Atk. 338.

(b) 1 G. & J. 101.

(c) 2 Ves. sen. 170.

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shareholders, but a personal interest in himself. But even if the shares should be considered real, it is not clear whether, under the 23rd section, the shareholder has not a right to dispose of them by a will not executed according to the Statute of Frauds. The conveyance *inter vivos* was not intended to be made according to the rules of law, and there is no reason to think that a will was intended to be placed on a different footing.

The plaintiff claims as heir-at-law of Timothy Brent, but he gives no evidence of an equitable seisin in fee. Supposing the shares to be real property, the conveyance to Timothy Brent would only pass a life estate, there being no words of inheritance.

Mr. *Simpkinson* in reply.—It is impossible to distinguish the nature of the property which the proprietors of this company originally acquired under the act of Geo. 1, from that of the property belonging to the New River Company. The question then is, whether the nature of the property of the Chelsea Waterworks Company has ever been varied? It is clear that unless barred by act of Parliament, or by charter under an act of Parliament, it must have remained the same. Now, what power was given by the charter to vary the nature of this property? The king is empowered to incorporate the proprietors by a certain name, and to authorize them to purchase lands in fee to a value not exceeding 1000*l.* per annum; he is also authorized to enable the corporation to make reasonable bye-laws. But that does not give the king power to alter the nature of the property, or to dispense with the Statute of Frauds. From what, then, can the inference be drawn, that the nature of this property was altered? Not from the act of Parliament, which is to be regarded altogether as a private act, and which therefore cannot alter the mode of devising real estate. The case cannot be decided by mere construction, drawn,

as in the case of an ordinary partnership, from the acts of the parties and the entries in books. It is not, in fact, a trading company, for the very act on which that argument is grounded prohibits the company from trading.

Where a partnership is established for avowedly trading purposes, it is said that any lands purchased for the purpose of the trading shall be deemed mere incidents of the partnership, and dealt with as personalty. That, however, only applies to a common trading partnership, and not to a case where the parties are severally entitled and not answerable the one for the other. Besides, supposing this to be a partnership adventure, it is not shewn that the future holders of the property are to be bound by that undertaking. Even in the case of a common partnership, after the affairs are wound up, the property, though considered for that purpose as personal property, would not necessarily retain that character *in perpetuum* as between the representatives of the partners. It is, therefore, not too much to say, that the whole property must follow the nature of its main ingredient, which is the realty. The realty and personalty together constitute the joint stock. In regard to that stock the interest of the *cestui que trusts* is co-extensive with that of the trustees, although the trustees or directors manage the whole fund. [Parke, B.—Then whether the property were real or personal, would depend from time to time on the option of the directors.] Such a result, though improbable, would not be contrary to law. In *Douglas v. Whitrong* (a), a person granted a lease for land for years, and in that lease power was given to the lessee to purchase the fee at a given price, provided he elected so to do within a given time. The lessor died during the term, having made his will, by which he devised the property as real estate. The will was properly attested. Afterwards the lessee elected

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(a) 16 Ves. 253, cited; S. C. nom. *Laves v. Bennett*, 1 Cox, 167.

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to purchase; and the question arising between the devisee and personal representative of the vendor, whether this was to be considered real or personal property in the testator, the Court held, that the lessee having made his election, that had relation back to the terms of the contract, and consequently that the property was personal and not real. The principle of that case, however, is not likely to require application to the present. Upon the whole, the character and objects of this company are not distinguishable from those of the New River Company. The case in *Shower* (a) is expressly in point.

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ALDERSON, B., now delivered the judgment of the Court.—This was a bill praying in substance that the defendant, Margaret Brent, widow and executrix of Timothy Brent deceased, may account for certain shares of the Chelsea Waterworks, and that it may be declared by the Court that the plaintiff as his heir at law became entitled to those shares, and that the other defendants, the Governor and Company of the Chelsea Waterworks, may be directed to insert in their transfer books the plaintiff's name as proprietor thereof. There is no dispute as to the facts, and the only question for the Court was, whether these shares were part of the real or personal estate of the testator. If the former, the plaintiff as heir at law is entitled to the decree he prays, because the will is attested by only two witnesses; and if the latter, his bill must be dismissed.

When this question originally came before me, I thought it one of so much difficulty, and involving such extensive consequences, that I was desirous the parties should have the benefit of having the opinion of my learned brethren also; and accordingly, in conformity to the practice here, (which is a peculiar advantage in the frame of the Court

(a) *Swaine v. Falconer*, Show. P. C. 207.

of Equity in the Exchequer), I adjourned the case to be heard before the full Court. The case was, in the course of last Michaelmas Term, very fully and ably argued before Lord *Abinger*, my brothers *Parke* and *Gurney*, and myself, and I am now to deliver the opinion of the whole Court on the point.

The Company of the Chelsea Waterworks was originally constituted under the provisions of the statute 8 Geo. 1, 1723. By that act, certain persons named therein were constituted commissioners, undertakers, and trustees for carrying into effect the works then projected, and for afterwards maintaining them. For that purpose his Majesty was, by a subsequent clause, empowered to incorporate them, by the name of the Governor and Company of the Chelsea Waterworks. And they were to have the power of purchasing lands not exceeding 1000*l.* per annum, and to sell and dispose thereof at their pleasure, and to do all necessary works, and to be subject to such rules, qualifications, and appointments as his Majesty should think reasonable to be inserted in the charter. And might also be empowered to make bye-laws from time to time, for the good government of the corporation.

In pursuance of this power, a charter of incorporation was granted almost immediately afterwards by George the First. That charter followed the directions of the statute, and gave the corporation power to purchase lands, &c., so as they did not exceed in value 1000*l.* per annum, and also estates for life or lives, and for years, and goods and chattels of what nature or value soever, for the better carrying on and effecting the purposes of the company, not exceeding the value of the joint stock of the corporation therein-after mentioned and limited, and to be taken and computed as part thereof.

The twenty-third section empowered the corporation by subscription to raise a joint stock, not exceeding 40,000*l.*, and to manage the same from time to time, and

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to receive the benefit and advantage of the same to the use of them the said governor and company and their successors, according to such shares and proportions as they or any of them have or shall have therein. And then it provided, that every person subscribing and contributing any sum or sums of money should, by virtue thereof, become members of the said corporation, and should be entitled to a share or shares in such joint stock (previously fixed at 20*l*. each), equal to the sum or sums of money so by him actually contributed and paid in, and no greater; and should be enabled to sell, assign, and transfer the same or any part thereof, (not being less than one whole share, as by a subsequent clause was provided,) by transfers in the company's books, in such manner as should be by a general court directed, or by his last will and testament; and the person to whom such assignment or transfer, or disposition by last will and testament, should be made, should by virtue thereof become member of the said corporation.

What, then, is the intention of the crown and legislature to be collected from all these particulars, as to the nature of the interest which each shareholder is to have? That is, in truth, the whole question in this cause. Now, in the first place, we have a corporation to whose management the joint stock of money subscribed by its individual corporators is entrusted. They have power of vesting it at their pleasure in real estate or in personal estate, limited only as to amount, and of altering from time to time the species of property which they may choose to hold; and, in order to give them greater facilities and advantages, certain powers are entrusted to the undertakers by the legislature, and that even before they were constituted a body corporate, of laying down pipes, and thereby occupying land for the purposes of their undertaking. These powers render the use of joint stock by the body corporate more profitable, but they form no part of the joint stock itself; and one

decided test of this is, that they belong inalienably to the corporation, whereas all the joint stock is capable expressly of being sold, exchanged, varied, or disposed of at the pleasure of the corporate body. It is of the greatest importance to look carefully at the nature of the property originally entrusted, and that of the body to whose management it is entrusted: the powers that body has over it, and the purposes for which these powers are given. The property is money—the subscriptions of individual corporators. In order to make that profitable, it is entrusted to a corporation who have an unlimited power of converting part of it into land, part into goods; and of changing and disposing of each from time to time; and the purpose of all this is, the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors.

It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments (and those varying and temporary instruments), whereby the joint stock of money is made to produce profit. Suppose the subscription had not been by the individual corporators, but that strangers having collected the money, had put it into the management of a corporate body having particular privileges, and had, after giving them power to vest the money at their pleasure, stipulated to receive these profits, could it be contended that the nature of the property of the subscribers depended on the mode of management by the independent body? And yet that is, in truth, this case; for the individual members of a corporation are quite as distinct from the metaphysical body called “the corporation,” as any others of his Majesty’s subjects are.

This case varies most materially from those which were cited in the argument. In the New River case, the individual corporators have the property. The corporation have only the management of it. Lord Hardwicke,

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in the case in *Atkyns*, expressly puts it on that ground. "They have the legal right," he says; "they may bring an ejectment for so much land covered with water; and the only difference between the shareholders of the king's half and the others is, that the corporation of management have, as to these shares, perhaps, the legal estate in them, the equitable estate being in the individual proprietors. In that case, too, the property given to the corporation was real property, which they are to manage for the good of all. They have no powers of converting it into any other sort of property, but must keep it, and make a profit from it as it is, viz.: as real property.

The same observations apply to *Buckeridge v. Ingram*, the Avon Navigation, with this addition, that there the undertakers do not appear to have been a corporation at all. And in both the shares are transferred to the shareholders and their heirs. But here, the case is wholly different—the property entrusted is money; the corporation may do what they like with it, and may obtain their profit in any way they please from the employment of their capital stock. If they thought that they could with greater profit supply water by conveying it in carts or the like, they would have a perfect right so to do. It would be strange that the nature of these shares should continually fluctuate, and be sometimes real estate and sometimes personal, according as the corporation in the course of their management should choose to hold real or personal property. Suppose a man made his will attested by two persons, and at a time when the corporation held only personal estate. It is good. He becomes lunatic or is incapable from age, and then real property is bought by the corporation. Is his will to be set aside? And yet he cannot make another.

Then, in what way has this property always been treated. If we look to the wording of the charter, the

language is much more suitable to personal than to real estate. Indeed, on the latter supposition, it is very inaccurate. Again, the form of transfer appointed by the legislature, (for that which is done under the provisions of the charter is, in fact, done by the legislature, and is, indeed, subsequently recognised by it), is applicable to personal estate only: These shares are not transferred to A. B. and his heirs, but A. B., his executors, administrators, and assigns, and so they have always been. This form, indeed, may be considered as almost a contemporary exposition of the law on this point.

Lastly, in *Weekley v. Weekley*, this point came expressly under the consideration of Sir *Thomas Sewell*, Master of the Rolls, and he decided that these shares were personal property.

Upon the whole, therefore, we think that the principles of law, the usage of the company, and the distinct authority of one decided case, are sufficient to warrant us in coming to the conclusion that these shares are personal property.

The result is, that the bill must be dismissed with costs.

Decree accordingly.

STEPHENS v. FROST.

July 9th.

THE bill stated that by an indenture of lease, dated in May, 1815, a certain piece of ground, situate near Lucas Street, in the parish of Saint George in the East, and four messuages situate in that street, were demised to John Barker, his executors, &c., for a term of 76 years; and that by an indenture dated the 1st of November, 1828,

A party who files his bill to obtain the benefit of an interest accruing by intestacy, must not only make the personal representative of the intestate a party

to the suit, but must charge that in fact there was a surplus of the intestate's estate after payment of all debts and incumbrances.

Where, after demurrer allowed for want of parties, the plaintiff is permitted to amend by adding parties, he is likewise permitted to amend by charging all such matters as constitute the equity of the case against the new defendant.

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and made between the said John Barker, of the one part, and the defendant Pownall of the other part, the premises comprised in the said indenture of lease were assigned by the said John Barker to the said Pownall, his executors, &c., for the residue of the said term, in trust for Thomas William Barker, (since deceased), the son of the said John Barker, until he should attain the age of twenty-one years, and in the meantime to stand possessed thereof, in trust to collect and receive the rents and profits thereof, as and when the same should become payable, and thereupon to pay, apply, and dispose of the same to and towards the maintenance, education, clothing, and support of the said Thomas William Barker during his minority; and upon the said Thomas William Barker attaining the age of twenty-one years, upon trust to assign the said premises, together with the said indenture of lease, and the accumulations of the rents and profits thereof (if any) unto the said Thomas William Barker, his executors, administrators, or assigns, absolutely, for all the remainder of the aforesaid term which should be then unexpired.

The bill then proceeded to state that, notwithstanding the aforesaid assignment, the said John Barker continued in the possession or receipt of the rents and profits of the said premises therein comprised, and he continued to be the ostensible proprietor and owner thereof until he made such assignment thereof as thereafter mentioned to his son-in-law, the defendant Frost; that the said Thomas William Barker had departed this life intestate and unmarried; that in September, 1833, the plaintiff brought his action and obtained a verdict against John Barker for a libel, and that John Barker was afterwards charged in execution at the suit of the plaintiff for costs and damages amounting to the sum of 300*l.* 10*s.*, and was committed to the Fleet; that when the verdict was obtained, John Barker was in insolvent circumstances, and that with a view of

defeating the plaintiff's execution, and the just claims of his other creditors, and of obtaining his discharge under the Insolvent Act, he voluntarily proposed to execute to Frost an assignment of the premises contained in the lease, and that accordingly, by an indenture of assignment which was prepared by Pownall, dated the 8th of January, 1834, and made between Pownall, of the first part, John Barker, of the second part, and Frost of the third part, Pownall, in consideration of 200*l.* expressed to be paid by Frost to John Barker, and by the direction of John Barker, assigned to Frost, his executors, &c., the premises comprised in the indenture of lease, to hold &c., for the residue of the term.

The bill then stated, that soon after the execution of the last-mentioned assignment, John Barker petitioned to be discharged under the Insolvent Act; that the plaintiff opposed his discharge, on the ground of fraud practised in executing that deed; that accordingly the Court remanded the prisoner to custody, and appointed the plaintiff his assignee. The bill then, after charging that the assignment to Frost was made by the insolvent voluntarily and without pressure, and that the same was in fraud of the plaintiff's rights, prayed a declaration to that effect, and that the defendant Pownall might be declared to be a trustee for the plaintiff of the premises comprised in the indenture of November, 1828, and also that the defendants Frost and Pownall might re-assign the premises, and deliver up possession of them to the plaintiff, &c.

It did not appear by the bill when Thomas William Barker died, or whether he died before or after the assignment to Frost.

To this bill the defendant Pownall demurred, first, for want of equity, and secondly, because the legal personal representative of Thomas William Barker was not made a party to the suit.

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Mr. Chandless, for the demurrer.—Admitting that the assignment to Frost was void against the plaintiff, on the supposition that the insolvent had an interest in the premises at that time, the bill does not shew that he had any such interest. Under the indenture of November, 1828, the son took an absolute interest, and that deed is not impeached. Then how is it shewn by the bill that upon the son's death the property came back to the insolvent? It is alleged, indeed, that the son died intestate, and that thereupon all his interest became vested in the insolvent, and passed to the assignee. That allegation might be sufficient by way of defence, but it is not a sufficient mode of stating a plaintiff's interest: *Walburne v. Ingleby* (a). However, the deed of assignment to Frost is not void; for the party having the legal interest joined in the assignment. Upon the second ground of demurrer, it is clear that the son's administrator ought to have been a party to the suit. The Court will not administer his assets to the prejudice of his widow or creditors.

Mr. Simpinson and *Mr. Keene*, for the bill.—*Barker*, the father, was the next of kin to his son, and was therefore entitled to the beneficial interest (if any) which his son had in the lease. [*The Lord Chief Baron*.—Suppose the son left creditors]. The person entitled to the administration is the next of kin. [*The Lord Chief Baron*.—I cannot take notice of that]. At all events, that is only a defect for want of parties. The defendant cannot insist that the plaintiff has no equity under the deed of November, 1828, to which the defendant himself was a party, and under which he became trustee for the son. Neither can he set up the subsequent deed of assignment to Frost, which was clearly fraudulent, and void against the plaintiff. His joining in that transaction while he was a trustee for the son, was an act of fraud. [*The Lord Chief Baron*.—No doubt,

(a) 1 M. & K. 61.

upon the statement in the bill, the deed is void. A deed, even under the statute of Elizabeth, would not be the less void because the trustee joined in conveying the legal estate]. That being so, the defendant is remitted to his former estate under the deed of November, 1828, and is a trustee for the plaintiff.

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Mr. Chandless having replied,

Some discussion took place as to the extent to which the bill might be amended, in case the demurrer were allowed. It was insisted, on the one hand, that the practice in this Court ought to follow that of the Court of Chancery, where, after the allowance of the demurrer, the plaintiff is not at liberty to amend except by adding parties; that in this case liberty to amend by merely adding parties would not cure the defects of the bill, as it must still be shewn that there was a beneficial surplus after payment of the intestate's debts, and consequently that no liberty to amend ought to be granted. On the other side it was contended, that when a plaintiff is allowed to introduce new parties, he is allowed to introduce proper charges in relation to those parties.

THE LORD CHIEF BARON.—My difficulty is this. The equity which the plaintiff seeks against Pownall is, that he may be declared a trustee for the plaintiff. But he cannot be a trustee unless certain facts, which do not appear upon the bill, are established, namely, that Barker, the son, died without leaving any debts, or without having encumbered his title or disposed of his equitable interest. For all that comes to the father would be the surplus, after satisfaction of all charges upon the property made by the son. It ought, therefore, to appear upon the bill that the son did not part with or mortgage his equitable interest. The plaintiff would then have an equity apparent

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on the face of the bill to make Pownall his trustee. It is said that he can only be allowed to amend his bill by adding parties; but if I give him leave to amend in that particular, he cannot do so to any effectual purpose without stating all these things. He must shew an equity against the party whom he makes defendant.

There is no doubt as to the propriety of the demurrer. The defendant cannot be the plaintiff's trustee unless the plaintiff shew that the father in fact, as well as by possibility, had an interest in these premises.

Demurrer allowed, with liberty to the plaintiff to amend upon payment of the defendant's costs of the demurrer.

Dec. 8th.

A father assigned certain leasehold premises to a trustee, in trust for his son until he should attain the age of 21 years, and in the mean time to stand possessed thereof in trust, to collect and receive the rents and profits thereof, as and when the same should become payable, and thereupon to pay, apply, and dispose of the same for and towards the maintenance, education, and clothing, and support of the

said son during his minority; and, upon his attaining the age of 21 years, upon trust to assign the said premises, together with the lease and the accumulations of rents, unto the said son, his executors, &c., for the remainder of the term:—*Held*, that the son took a vested interest in the lease, and that, upon his death under 21, it passed to his personal representative.

Demurrer, under circumstances, allowed to amended bill, after answer to original bill.

The plaintiff amended his bill by introducing statements and charges to the following effect: that at the date of the assignment to Frost, T. W. Barker was of the age of seventeen years, or thereabouts, and that he departed this life on or about the 6th May, 1831, under the age of twenty-one years; and that thereupon the beneficial interest in the leasehold premises resulted to and became vested in John Barker. That, although the beneficial interest in the leasehold premises resulted, as before mentioned, and it is so recited in the assignment to Frost, yet it is sometimes alleged by the defendants, or one of them, that the said T. W. Barker took a vested interest in the premises, by virtue of the assignment of the 1st November, 1828, and at times it is also insisted by the defendants, or one of them, that the defendant Pownall, in whom the legal estate of the said premises became vested, by virtue of such assignment, is a trustee thereof for the legal personal repre-

representative of the said T. W. Barker, who, it is also alleged by the defendants or one of them, is a necessary party to this suit; whereas the plaintiff charges that no one has yet taken out administration to the said T. W. Barker, so that the plaintiff is at present unable to make the personal representative of the said T. W. Barker a party to this suit. And plaintiff charges and insists, that under the circumstances of this case the said defendant, C. E. Pownall, is and ought to be declared a trustee for the plaintiff, as such assignee as aforesaid of the legal estate of the said leasehold premises.

To the bill so amended (a), the defendants Frost and Pownall severally demurred:—first, for want of equity, and secondly, because the personal representative of T. W. Barker was not before the Court.

Mr. Chandless, for the defendant Frost.—Barker, the son, took a vested interest under the deed of November, 1828. It will be said that that deed was only to take effect in the event of his attaining twenty-one. It is clear, however, that he had an immediate interest under the deed, although, previously to his attaining twenty-one, the trustee had a discretionary interest in applying the profits to his maintenance. By this deed the trusts are declared of the whole equitable interest, and no express trust is declared for Barker the father. He might have inserted a limitation to himself if he pleased, but he has not done so, and with good reason; for if he had, and Barker the son had married and left children, and died under twenty-one, the children would have been unprovided for. The same argument applies, if this be considered a resulting trust for Barker the father. There is no case in which the construction has been put upon a trust of this nature contained in a deed, though there are a variety of cases relating to such trusts under a will. But trust deeds of this

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(a) See 4 Sim. 485.

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sort are looked at with the same indulgence as wills: *Sheldon v. Dormer* (a). In regard to wills, there are two classes of cases, involving trusts of this sort, and in which it has been held that the party, though dying under twenty-one, takes an immediate vested interest. The first class is, where real estate is devised to a party "when" he shall attain, or "upon" his attaining twenty-one: *Boraston's case* (b), *Doe d. Hunt v. Moore* (c), (which goes farther than *Boraston's case*, there being no devise of the immediate interest); *Bromfield v. Crowder* (d), *Doe d. Roake v. Nowell* (e), *Goodtitle d. Hayward v. Whitby* (f), *Stanley v. Stanley* (g). The other class is, where a legacy is bequeathed to a person at twenty-one, and the interest is bequeathed to him, or a trustee is appointed for him in the meantime: *Hanson v. Graham* (h), *Murray v. Addenbrook* (i).

The other ground of demurrer is, that there is no personal representative of Thomas William Barker before the Court, and no allegation of a surplus owing to the plaintiff after payment of the intestate's debts. The question on the construction of the deed could not be decided in the absence of the personal representative, and therefore, as an excuse for not making him a party, the plaintiff alleges that no one has yet taken out administration of his

(a) 2 Vern. 310.

(b) 3 Rep. 19, a.

(c) 14 East, 601.

(d) 1 N. R. 313.

(e) 1 M. & S. 327.

(f) 1 Burr. 228.

(g) 16 Ves. 491.

(h) 6 Ves. 239.

(i) 4 Russ. 407. Legacy to A. and B. "when" they shall attain twenty-one, share and share alike; "and I appoint C., the father, in trust for the same, and trustee for them during their minority;" and

in case of the death of either, the survivor to take the whole; and in case they both die in their minority, then over: A. and B. take a present vested interest: *Bramstrom v. Wilkinson*, 7 Ves. 421. So where legacies were given to children, "provided" they attained twenty-one, with an appointment of trustees and guardians to see to their education: *Mills v. Roberts*, 1 Russ. & Mylne, 555. And see *Judd v. Judd*, 3 Sim. 525; *Hunter v. Judd*, 4 Sim. 455.

effects. That, however, is not a sufficient allegation: *Cawthorne v. Chalie* (a).

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Mr. G. Richards, for the defendant Pownall.—The cases which have been cited apply. T. W. Barker took a vested interest under the deed of November, 1828, although he died before he came into possession. Upon the construction of that deed, the child being a minor, the trustee has the disposition of the rents and profits for his benefit, until he attains twenty-one, and then the care and management of the property is to be his. Suppose the same provision had been made for a girl, who might probably have married under twenty-one, would it have been contended, in case of her dying under that age leaving issue, that the issue were not to take? Yet that argument would hold, if the construction relied on by the plaintiff is correct. *Edwards v. Symons* (b), *Doe d. Wheedon v. Lea* (c).

To meet the other ground of demurrer, the plaintiff alleges that, no administration having been granted, he is unable to make Thomas William Barker's representative a party. But by applying to the Ecclesiastical Court he might have remedied that defect. If a plaintiff, so situated, is not the next of kin, he must cite the next of kin. If they do not appear, he must himself procure letters of administration. Here the party is himself the representative of the next of kin of the deceased, and might have taken out letters of administration.

It is said that the deed of assignment to Frost is fraudulent and void. But there is no allegation that Pownall had notice of the fraud, and he was therefore bound to convey as directed by his *cestui que trust*. That being so, the legal estate is vested in Frost, and whether it is vested for Frost's benefit, or in trust for the plaintiff, is a matter of

(a) 2 S. & S. 127.

(b) 2 Marsh, 24; 6 Taunt. 213.

(c) 3 T. R. 41.

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indifference to Pownall, and he ought not to have been made a party to the suit.

Mr. *Simpkinson* and Mr. *Keene*, for the bill.—This is an amended bill, and the amendments principally consist of a statement that Thomas William Barker died under twenty-one, intestate, and that no one has taken out administration of his effects. To that amended bill, both as regards relief and discovery, the defendant Frost has put in a general demurrer, although to the original bill he put in a full answer. It is clear that if a party demurs to a bill, and answers any part which is covered by the demurrer, the answer overrules the demurrer. The same principle applies in a case like the present, where the amendments are so trifling that the defendant, in effect, both answers and demurs to the same bill: *Hilliard v. White* (a), *Spurrier v. Fitzgerald* (b), *Atkinson v. Hanway* (c), *Bosanquet v. Marsham* (d). If the plaintiff had made a totally different case by his amended bill, the defendant's right to demur to the amended bill could not have been disputed; but here the relief sought by both bills is the same, and the facts stated are substantially the same.

Proceeding, however, to the main ground of the demurrer, the first question is, whether the defendants are not estopped from disputing the plaintiff's title? All the title which the defendant Frost possesses is derived from the deed of assignment, and that deed expressly recites that Barker, the father, took by way of resulting trust. The present bill impeaches this deed for fraud in the defendant Frost. Then, can he turn round and say—It is true I committed the fraud complained of, but you in fact had no title to the premises, and although under that deed alone I am in possession, yet I insist that you cannot set it up against me? When a transaction between A. and B. is impeached for fraud alleged to have been committed by

(a) Mitf. Pl. 3rd ed. 242.

(b) 6 Ves. 548.

(c) 1 Cox, 360.

(d) 4 Sim. 573.

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B., the Court will not go into the question whether A. had good title. The only question will be fraud or no fraud. It would seem, therefore, that as between the defendant and the plaintiff, this consideration of estoppel alone is fatal to the demurrer. To meet the question, however, upon the ground of construction, it is difficult to say how the cases upon wills have any reference to that of a deed. Besides, in none of those cases were the words in question precisely similar to the present. Here the word used is "upon;" there the vesting was to take place "when" and "as" the individual had attained twenty-one. The word "upon" in a will, imports a condition precedent, unless there be any thing in other parts of the will repugnant to that construction. Suppose an estate is given to A. till B. returns from Rome, and when B. returns, then to C., can it be contended that before B. returns from Rome the estate vests in C.? [The *Lord Chief Baron*.—But suppose it is given to trustees upon trust to give him the rents and profits till he returns from Rome, and when he returns to give it to him absolutely.] In *Spencer v. Chase* (a), a father devised lands to trustees and their heirs until his son should come of the age of twenty-five years, and then in trust for him and the heirs of his body, remainder to the right heirs of the father; and the Court was of opinion that the son had no vested interest until twenty-five. That case is scarcely distinguishable from the present. [The *Lord Chief Baron*.—In that case the decree was inconsistent with the *dictum*.] At all events, there is no case upon a deed which has any bearing upon the present, except that of *Campbell v. Prescott* (b), and there it was held that the shares did not vest. It was a case of personalty only, but the principle of that case will equally apply to realty. In *Edwards v. Symons and Doe v. Lea* there were limitations over after the devise to the children, which distinguishes those cases from the present.

(a) 9 Mod. 30.

(b) 15 Ves. 500.

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Then, as to the objection for want of parties. [The *Lord Chief Baron*.—You consider the demurrer, for want of parties, to be matter of form; but, in fact, it involves the other question: for there can be no want of parties here, unless the estate was vested in the son.] Under any circumstances the objection cannot be taken by demurrer, after having been taken by answer. The bill has been amended, by stating that T. W. Barker died under twenty-one, intestate; but that does not vary the merits of the answer. Therefore the answer overrules the demurrer. Besides, in a case like this, the plaintiff was not bound to take expensive proceedings to cite the next of kin: 2 *Madd. Ch. Pr.*, chap. 7; *Bowyer v. Covert* (a).

Mr. *Chandless*, in reply, being called upon to address himself to the sole question, whether Frost's demurrer was overruled by his answer to the original bill, contended that, as every matter relating to T. W. Barker had been omitted in the original bill, the amended bill brought forward substantially a new case.

The LORD CHIEF BARON.—It appears to me that the question turns upon the construction of the deed of assignment to Frost. If his answer to the original bill had been put in as a defence to the same case which now appears upon the record, I should have thought, both upon principle and authority, that his present demurrer came too late. But it appears that the original bill was founded on a different case from that which is now put forward, not giving rise at all to this objection as to the nature of the son's interest, and therefore the defendant has a clear right to meet the new matter introduced either by demurrer or plea. Here the amended bill discloses the very objection, the omission of which precluded the defendant from de-

(a) 1 Vern. 95.

murring to the former bill, and therefore I think that his demurrer is not inconsistent with his original answer. That puts both his pleadings in the same predicament; and the question now is, whether all the proper parties are before the Court. That question turns upon the construction of the deed, under which it is supposed that Barker, the father, can claim a resulting trust.

It appears to me that it will be less expensive to the parties to decide this question now, as my opinion is strong upon it, that to reserve it for the opinion of the full Court, or of a court of law. My opinion is that the father took no resulting trust under this deed, but that this was a vested interest in the son; and consequently that the son's personal representative must be before the Court to enable the Court to make a decree; and that the want of parties in this respect is not a mere defect in form. The bill states that the son died intestate and unmarried, but it does not proceed to say that he did not contract such debts as his personal representative would be called upon to pay; therefore such representative, not being bound by proceedings in a suit in which he was not present, might afterwards open the decree by taking out administration, for the purpose of paying the creditors. The decree in this suit would not affect such a proceeding; and, therefore, supposing the son to have taken a vested interest under the deed, the absence of his personal representative would be a good ground for demurrer. Now, as to the deed, it is quite clear that this was an absolute assignment to trustees for the benefit of the young man during his minority, and that the legal estate was to be transferred to him at twenty-one. If there is any difference between a deed and a will in cases where the instrument admits of two constructions, the deed is to be taken the more strongly against the grantor. Here the father makes an absolute provision for the son, but does not enable his son to contract in relation to the property till he arrives at twenty-one, at which period

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the trustees are to convey to him the legal estate. Suppose they do not convey it to him at twenty-one, they would apply the rents and profits according to his direction, even if he did not call for a conveyance till he was forty. It would be a continuance of the equitable estate. The purpose was that it should be vested in him. If he had married and had children, the trustees would have held it for his children. Upon these grounds, I think that the personal representative of the son ought to appear. It is very true that upon either construction of the deed the father would ultimately take the son's interest, and it may be probable that in either case the plaintiff would have the same benefit. But it appears to me that if he claims through a personal representative of the son, as I think he must, he ought either to clothe himself in that character, or at all events make the personal representative a party to the suit. The demurrer must be allowed ; but I shall give the plaintiff liberty to amend by adding parties.

Demurrer allowed.

ANONYMOUS.

A general answer, if it include an answer to all the particular charges, is sufficient.

IN a bill filed by occupiers against a rector to establish a modus, one of the interrogatories was—" And whether the said defendant hath not now, or whether he had not at some time, and when, in his possession, custody, or power," four books, which were specified in the bill.

The defendant denied that he had in his possession, custody, or power, the four books in the bill mentioned, or that he had then or ever had had any books relating to the matters inquired after by the bill, save and except those which he had set forth in the schedule to his answer. He then annexed to his answer a schedule of books.

An exception having been taken to the answer for insufficiency,

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Mr. *Walker*, for the exception, contended that an answer to a general charge, though it include an answer to a particular charge, is insufficient. He cited *Wharton v. Wharton* (a).

Mr. *Duckworth*, contra.

PER CURIAM.—The defendant says, first, I have not the four books you mention; secondly, I have set forth in a schedule all the books I have, and, excepting what I have there set forth, I never had any books. The proposition of Sir *John Leach*, in *Wharton v. Wharton*, is too general. *Dolus latet in generalibus* in some cases, but not in all. The opinion of a Judge on grammar is not of so much force as his opinion upon law.

Exception overruled.

(a) 1 S. & S. 235.

THOMPSON v. HODGSON.

July 4th.

MR. *WRAY* moved that the sale in this cause might be conducted by an auctioneer in the country, to be approved by the Master. He said that the estate was insolvent, and that it was advisable to avoid the expense of sending the Master's clerk into the country.

Auctioneer in the country appointed to conduct the sale under a decree, to avoid the expense of sending the Master's clerk.

Motion granted.

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July 9th.

JONES v. THOMAS.

Papers and documents produced by the defendant for the plaintiff's inspection, ordered, upon motion before hearing, to be re-delivered to the defendant, the plaintiff having had full opportunity to inspect them.

MR. METCALFE moved, before hearing, for the re-delivery of certain letters and other documents, which had been left with the defendant's clerk in Court, under the usual order for production. That order was dated the 23rd January, 1828, since which time the plaintiff had had every opportunity of inspecting them. The object of the present motion was, that those letters and documents might be produced on a commission to examine witnesses; the defendant undertaking to return them on the return of the commission.

Mr. Roupell, for the plaintiff, opposed the motion, on the ground that the usual order for production implied an order for the safe custody of the papers. He likewise contended that the circumstance of the plaintiff's having had ample time to inspect these documents was not a sufficient reason for granting this motion, as they might be wanted on the trial of the action to which this cause related.

THE LORD CHIEF BARON.—The usual order for production of papers and documents is for the purpose of inspection, and not of safe custody. As to the other objection, it may be true that the papers might be wanted on the trial of the action, but I must not assume facts for the purpose of depriving a party of his documents. He ought to have them back again unless any thing special is shewn to the contrary. He offers to bring them back again on the return of the commission.

Motion granted

See Stiles v. Gray - 47 m. & C. Ex. 571.

GREGORY v. GREGORY.

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Nov. 8th,
Dec. 12th.

21-455
JAMES GREGORY, the elder, by his will, after directing the payment of his just debts, gave, devised, and bequeathed unto his nephew John Gregory, his son James Gregory, and his son-in-law James Pollit, all those his two closes or parcels of land called the Checkers, otherwise Pilkington Fields, then in his own occupation, and also all and singular his stock, utensils in trade, household goods and furniture, and other personal estate and effects whatsoever and wheresoever, to hold the same unto the said John Gregory, James Gregory the son, and James Pollit, their heirs, executors, &c., upon trust, that they, or the survivors or survivor of them, or the heirs, executors, &c. of such survivor, should absolutely sell and dispose of the said two fields, stock, and other effects and premises, and by and out of the proceeds of the sales pay or retain to his said son James Gregory, and to his daughter Ann, the wife of the said James Pollit, 1000*l.* a piece, which he gave and bequeathed to them accordingly. And after payment of those legacies the testator bequeathed all the residue of the money to arise from the sales aforesaid, and of all his estate and effects whatsoever, unto his said son and daughter, and unto his grandson James, the son of his late brother John Gregory, their respective executors, administrators, and assigns, to be equally divided amongst them, share and share alike as tenants in common. The testator then provided, that in case his said grandson should die under twenty-one, without leaving issue, then his share of the residue should go to the other residuary legatees. Provided also, and it was the testator's express will, mind, and direction, that in the sales of the said two closes, his said son James Gregory, his heirs and assigns, should have the option of taking the same at the price or sum of 700*l.*, and no more, if they should think proper.

Testator having devised a real estate to his three executors upon trust, to sell and apply the produce of the sale as part of his personalty, and having given to one of his executors an option to purchase the estate at a certain price, the two other executors conveyed it to him, and joined in a receipt for the purchase money. The purchase money was, in fact, not paid, and afterwards the third executor became bankrupt:—*Held*, that the two other executors were answerable to the residuary legatee for the deficiency.

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And the testator appointed the said John Gregory, James Gregory the son, and James Pollit to be his executors.

The testator died in December, 1804, without revoking his will, leaving the several parties named in it surviving him. The three executors proved the will, but the entire management of the testator's property was left to James Gregory, the son, who immediately upon the testator's death took possession of the personal estate, and received the rents and profits of the real estate, and paid the testator's debts. He likewise elected to purchase the two closes, upon the terms mentioned in the testator's will, and accordingly that property was conveyed to him in indentures of lease and release, dated in January, 1808, which were executed by John Gregory and Pollit. That conveyance was expressed to be made in consideration of 700*l.*, paid by James Gregory the son, and a receipt for the purchase-money was endorsed on the deed, and signed by John Gregory and Pollit. In fact, however, no part of the purchase-money was ever paid by James Gregory the son, and in 1816 he became bankrupt.

The present bill was filed by James Gregory the grandson, against the executors and the assignees of James Gregory the son, praying a general account of the testator's estate, and, if necessary, that the defendants John Gregory and Pollit, might be personally charged with the said sum of 700*l.*, and interest thereon.

The defendants, John Gregory and Pollit, by their answer, admitted that they had executed a deed, which they believed to be a conveyance of the closes in question to James Gregory the son, and that they had joined in a receipt for the purchase-money. But they said that they had done this merely for conformity as trustees, and that they had never interfered with or received any part of the testator's estate.

The question was, whether, under these circumstances,

they were to be made answerable for the non-payment of the purchase-money by James Gregory the younger?

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Mr. James Russell, for the plaintiff.

Mr. Koe and *Mr. Girdlestone*, for the several defendants.

ALDERSON, B.—In this case the only question is, whether I should direct in my decree that John Gregory and James Pollit, the trustees under the will of James Gregory, the elder, should be charged with the sum of 700*l.* and interest, which it is contended they ought to have received from James Gregory, the son, their co-trustee; and whether I should further direct an inquiry as to what other sums have been lost to the estate by their wilful default.

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These parties were two of the three executors under the will of James Gregory the elder. That will contained a clause expressly giving an option to James Gregory, the son, the third executor, to purchase for the sum of 700*l.* certain closes, which had been devised to the executors in trust to be sold for the general purposes of the will. James Gregory, the son, availed himself of this option, and a conveyance was accordingly, in January, 1808, executed by John Gregory and James Pollit to James Gregory, the son, of the lands in question; and on the back of the conveyance they both signed a receipt for the purchase-money. Now, in fact, neither of them received it, but it remained unpaid by James Gregory, jun., who became a bankrupt in 1816.

It is contended, that in this case the parties are trustees, not executors, and that the rule as to their liability stands on different grounds from that of executors. In the case of executors, if they join in the receipt of money which may be lawfully received by each, the better opi-

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nion is, that they are all liable, seeing that the receipt must in that case be reasonably taken to amount to an admission, by each, of his having an actual controul over the money received. It is not worth while to canvass the law on this subject minutely, or to discuss the exceptions, some of which may be found in the books, to the above rule. But the case of trustees who join in receiving for conformity is different. There, those only are chargeable by whom the money was actually received. But both executors and trustees are liable for breaches of trust, or for gross neglect. The principles are fully stated by Lord *Thurlow* in *Sadler v. Hobbs* (a), and by Lord *Eldon* in *Brice v. Stokes* (b).

Now here, James Gregory, the son, could only lawfully possess himself of the estate, by availing himself of the conditional option given by the will. The duty of the others, whether co-executors or co-trustees, was to see that that condition was performed by him. Without that they ought not to have conveyed at all. Having conveyed, and having affirmed by signing the receipt that they had performed their duty in that respect, I think they must be taken to have received the money, and that it does not lie in their mouths to say that they have committed a breach of duty, in leaving the money in the hands of their co-trustee, the purchaser of the estate.

Lord *Redesdale*, in *Joy v. Campbell* (c), speaking of the case of executors, lays it down that the true question is, whether the receipt purports that the money was under the controul of both executors, and if so, the one who did not receive it, is still responsible as if he had. That principle is also applicable to this case. Here, the receipt purports that the money, as it ought to be, was under the controul of John Gregory and James Pollit, and, there-

(a) 2 Br. C. C. 114.

(b) 11 Ves. jun. 324.

(c) 1 Sch. & Lef. 341.

fore, makes them responsible. If, indeed, one of them had received the money, the case would have been different as to the other who had not received it. But here, neither of them having received it, I am of opinion that both have been guilty of a breach of duty, and that both are liable to make good the loss arising therefrom. I propose, therefore, to add to my decree a direction to the Master to inquire whether these things are so, and if he finds the facts as above suggested, to charge these parties with the receipt of 700*l.*, and with interest at 4*l.* per cent. But I do not think it necessary to direct him to charge them with any other sums beyond those which they may have actually received.

Decree accordingly.

MABER *v.* HOBBS.

Nov. 8*th*,
Dec. 12*th*.

67-18. C4-434
ELIZABETH BROOK, spinster, transferred two several sums of 800*l.* new 3*l.* 10*s.* per cent. Bank Annuities, and 21*l.* Long Annuities, her property, into the names of herself and of John Wood Wilkes and Henry Frederick Gray, in the books of the Governor and Company of the Bank of England, and by an indenture of settlement, bearing date the 9*th* of April, 1828, which was the day of the transfer,

E. B., a single woman, transferred certain stock, her property, into the joint names of herself and two trustees; and on the day of the transfer, she and the trustees, without reference to any marriage

on her part, executed an indenture, by which it was declared that the trustees should hold the property in trust, to pay the dividends to E. B. for her life, for her sole and separate use, independent of any husband whom she might marry; and, after her death, upon such trusts as E. B. should by will, notwithstanding her coverture, appoint; and, in default of such appointment, in trust for E. B., her executors, administrators, and assigns. E. B. afterwards married, and by a deed, reciting the settlement, and executed by her husband and herself, she, by the direction of her husband, assigned the dividends of the stock in trust, for the punctual payment of an annuity granted by the husband:—*Held*, that, whether or not under the deed of settlement the wife had power, as against her husband, to make this assignment, the joining the husband in the deed of assignment was a confirmation of the deed of settlement, and consequently that the assignment by the wife was valid.

Quære, whether, notwithstanding the case of *Davies v. Thornycroft*, 6 Sim. 420, a trust for the separate use of a single woman is valid against an after-taken husband?

The 54*th* and 56*th* sections of stat. 6 Geo. 4, c. 16, are not confined to mere personal obligations by the surety, but are applicable to cases where the property of the surety is assigned as a collateral security for the debt of the principal.

Where the whole consideration money is paid to the grantor of an annuity, and out of that money the attorney immediately receives from the grantor the amount of his bill of costs, this is not an illegal retainer within the Annuity Acts.

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and made between herself of the one part, and the said J. W. Wilkes and H. F. Gray of the other part, it was declared that the said J. W. Wilkes and H. F. Gray, their executors and administrators, should stand possessed of the said two sums of stock, and the dividends and annual produce thereof, upon trust, to permit the said dividends and annual produce to be received by, or otherwise to pay the same into the hands of the said Elizabeth Brook during her life, for her sole and separate use, independent of any husband with whom she might intermarry, and so as the same should not be subjected to his debts, controul, or engagements; and her receipt only, or the receipt of any person or persons whom she might from time to time appoint to receive the same, was to be an effectual release and discharge for the said dividends, &c. And immediately after her death, upon trust, that the said trustees, and the survivor of them, his executors and administrators, should stand possessed of, and interested in, the said Bank and Long Annuities, upon and for such trusts, intents, and purposes as the said Elizabeth Brook should, notwithstanding her coverture, by her last will and testament, to be executed as therein mentioned, direct or appoint; and for want of such direction or appointment, in trust for the said Elizabeth Brook, her executors, administrators, and assigns.

After the execution of this deed, a marriage took place between Elizabeth Brook and the defendant John William Hobbs; but it did not appear that the deed had been made in contemplation of that or any other marriage.

Soon after the marriage, the husband being in want of money, applied to the plaintiff for an advance of 300*l*. This was agreed to in consideration of an annuity of 27*l*. for certain lives, to be secured by the covenant of the husband, and by the appointment and assignment of the wife of the dividends of the stock during the lives for which the annuity should be payable. The plaintiff ac-

cordingly paid the consideration money into the hands of Mrs. Hobbs, who immediately handed it over to her husband. The latter then paid out of it 45*l.* to the solicitor for his bill of costs.

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The annuity deed, which was executed by Hobbs and his wife of the one part, and the plaintiff of the other part, after reciting the transfer of the stock into the names of Mrs. Hobbs (then Elizabeth Brook) and her trustees, and likewise the deed of trust, witnessed, that in consideration of the sum of 300*l.* paid as thereafter mentioned, the said J. W. Hobbs granted, bargained, sold, and confirmed unto the plaintiff, his executors, administrators, and assigns, one annuity or clear yearly sum of 27*l.*, to have, hold, receive, and take the same, unto the plaintiff, his executors, administrators, and assigns, during the lives of Hobbs and his wife, and the plaintiff and other persons named in the deed. And it was further witnessed, that in consideration of the sum of 300*l.* to the said Elizabeth Hobbs, in her own proper person, in hand paid by plaintiff, the said J. W. Hobbs did covenant with plaintiff for the payment to him, his executors, administrators, and assigns, of the said annuity, by half-yearly payments on the days therein mentioned. And it was further witnessed, that for securing the due payment of the annuity, the said Elizabeth Hobbs, in the exercise of the power or authority given to or vested in her by the indenture of settlement, and of all and every other powers and authorities, and with the consent and approbation of her said husband, did direct and appoint, bargain, sell, and assign unto the plaintiff, his executors, &c., all the interest, dividends, and annual produce to arise and become payable during the lives aforesaid, for or in respect of the said two sums of stock vested in the names of the-before named trustees, upon the trusts of the said settlement; and all right, title, &c. of her, the said Elizabeth Hobbs, of, in, to, or out of the said dividends, interest, and annual proceeds, and every part thereof, or of, in, to,

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or out of any other estate, monies, stocks, funds, and securities, which the said Elizabeth Hobbs might or should thereafter have, take, or be entitled to, under or by virtue of the said indenture of settlement, and the yearly dividends, interest, and annual produce thereof; to have, hold, receive, and take the premises unto the plaintiff, his executors, &c., upon trust, out of the said dividends, interest, and premises, to retain the said annuity in the manner in the annuity deed mentioned, and to pay such costs, charges, and expenses as the plaintiff, his executors, &c. should sustain or be put unto by reason of the non-payment thereof, and to pay the residue from time to time unto, or to permit the same to be received by the said Elizabeth Hobbs or her assigns, for her and their own use and benefit. The deed then contained a power of attorney from Elizabeth Hobbs to the plaintiff, authorizing him, his executors, &c., to sue for, recover, and take the said dividends, interest, and premises when due, and to give receipts for the same; and also a declaration that every receipt or discharge which should be given, made, or executed by the plaintiff, his executors, &c., concerning the premises, should be binding and conclusive on Elizabeth Hobbs. The deed also contained a proviso for repurchase of the annuities by Hobbs and his wife, or either of them, their or either of their assigns.

The annuity was regularly paid to the plaintiff until the bankruptcy of Hobbs, which took place on the 23d of November, 1832. The plaintiff refused to prove for the amount of his annuity under the fiat, but in February, 1833, after Hobbs had obtained his certificate, he filed the present bill against Hobbs and his wife, the trustees under the deed of settlement, and the Governor and Company of the Bank of England, praying for an account and satisfaction of the arrears of the annuity; that for that purpose the stock might be transferred into the name of the Accountant-General; and that in the interim any transfer

of the dividends for the benefit of the defendants Hobbs and wife might be restrained.

The grounds of defence were—first, that Mrs. Hobbs was not a principal in the annuity deed, but only a surety for her husband, and that the plaintiff not having proved for the annuity under the fiat, he had lost his remedy against both the defendants, the bankrupt being discharged by his certificate; and secondly, that if Mrs. Hobbs was a principal in the annuity deed, all her interest in the property thereby assigned, subject to the plaintiff's claims, passed upon the bankruptcy of the husband to his assignees, and they ought therefore to have been parties to the suit. The defendants Hobbs and wife likewise insisted by their answer, that the mode of payment of the consideration money was illegal. It will be seen, however, that they did not press this objection at the hearing.

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Mr. Boteler and Mr. Wood, for the plaintiff.—It is objected to this bill, that the wife was only surety for the husband, and that the plaintiff ought to have proved under the fiat before he sued the surety. But the 55th section of the Bankrupt Act applies only to those cases where there is a mere personal undertaking by the surety, and not where the grantee of the annuity has taken the precaution to have it charged as a permanent fund. [*Alderson, B.*—Is there any authority for saying that that section is merely confined to personal obligations?] There is no express authority to that effect; but it cannot be that the bankruptcy of one of the parties puts an end to the charge which the other has taken the precaution to make. The legislature could not have intended such a result without more peculiar words. However, even supposing that in an ordinary case the statute would have the effect contended for, here the plaintiff could not sue the wife personally, but only the fund settled to her separate use. In

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other cases the surety might sue the principal afterwards, but here it would be impossible so to do.

But it is not necessary to pursue the question of suretyship, because in fact the agreement was with both the husband and wife, and the grantee made the wife a principal in the transaction. The money was paid into the hands of the wife. It will be said that the plaintiff has departed with his remedy, because part of the consideration money was paid over to the solicitor, but the manner in which that was done was legal; *Mouys v. Leake* (a), *Hurd v. Girdlestone* (b), *Aston v. Gwinnell* (c). [*Alderson*, B.—In *Barber v. Gamson* (d), the same point occurred. The whole money was paid down by the grantee, and part of it paid over to the attorney. The question is, who is liable originally to the attorney? If a person granting an annuity agrees originally with the attorney for payment of his costs, the grantee is not responsible as for a fraudulent retainer. In many of the cases there is an express stipulation to that effect]. In *Mouys v. Leake* there was no express stipulation, and yet the deed was supported. At all events, the Court has a discretionary power as to setting aside this deed on the ground of retainer: *Barber v. Gamson*, *Williamson v. Gould* (e), *Gorton v. Champneys* (f), *Girdlestone v. Allan* (g).

Mr. G. Richards, for a defendant, a prior incumbrancer on the fund.

Mr. Simpinson and Mr. Kenyon Parker, for the defendants Hobbs and wife.—The question is, whether Mrs. Hobbs had power to pledge these Bank Annuities, either as principal or surety? Before her marriage she was en-

(a) 8 T. R. 411.

(b) 1 Marsh, 407; 6 Taunt. 8.

(c) 3 Y & J. 136.

(d) 4 B. & A. 281.

(e) 8 Moore, 109; 1 Bing. 234.

(f) 8 Moore, 302; 1 Bing. 287.

(g) 1 B. & C. 61.

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titled to them absolutely. Afterwards she executed a deed, dated the 9th of April, 1828, not in contemplation of her marriage with Hobbs, but being a spinster, by which she conveyed the Bank Annuities to trustees for her separate use, independent of the control of any future husband. The question is, whether, notwithstanding this, the fund did not belong absolutely to her husband. Property may undoubtedly be given to the separate use of a married woman; but property given or conveyed to the separate use of a spinster, without reference to her marriage with any particular person, vests in the husband whom she afterwards marries. This property therefore vested in Hobbs, and she had no power to assign it: *Newton v. Reid* (a), *Woodmeston v. Walker* (b), *Massey v. Parker* (c). That being so, the Court cannot grant relief in this case in the absence of the assignees of Hobbs, who are the parties most materially interested in the fund. On reference to the annuity deed, it will be found that Hobbs enters into no covenant for securing the annuity on these funds. He only covenants to pay the annuity; though, even if he covenanted beyond that, it would not remove the objection for want of parties. At all events, the assignees are entitled to be heard on this question. But should the Court be against the defendants on this point, the next question is, what was the real transaction between the parties? Was it a joint contract for the benefit of Hobbs and his wife, or substantially for the sole benefit of Hobbs? Was not the payment made to Mrs. Hobbs for the mere purpose of giving colour to the transaction, so as to attempt to affect her separate interest? According to the plaintiff's own deed, it was not a grant of annuity by the wife, but the husband. It is true that the whole consideration was in the first instance paid to Mrs. Hobbs, but the defendants swear that the whole contract was with

(a) 4 Sim. 141. (b) 2 Russ. & M. 197. (c) 1 M. & K. 174.

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Hobbs alone, and that he, conceiving that his wife had a separate interest in this property, applied to her to guarantee the payment of the annuity out of her separate estate. She did so, under the belief that her act was merely that of a surety, and not that of a principal. Assuming that she was a surety, the case is within the 54th and 55th sections of the Bankrupt Act. The latter of these sections must be construed with reference to the former.

The defendants make no objection, on the ground of illegal retainer under the annuity acts.

Mr. *Bethell* and Mr. *Hallett*, for the defendants, the trustees of the settlement.—The trustees are to see that all parties interested are before the Court. Whether the assignees should be parties depends on a question on which a difference of opinion exists in the Court of Chancery; the Vice-Chancellor holding that a trust for the separate use of a single woman is valid against the party whom she may afterwards marry, while other Judges hold the reverse. The cases which occurred before Vice-Chancellor are *Benson v. Benson* (a), and *Davies v. Thornycroft* (b). In the latter the express point was decided; and his Honor took a distinction between the clause against alienation and the clause for separate use. On the other hand, all the observations in *Massey v. Parker* tend to shew that the doctrine, as to a clause against alienation being good or otherwise against a subsequent marriage, applies with the same force to a trust for separate use. A proviso

(a) 6 Sim. 126.

(b) 6 Sim. 420. The effect of this case is to give testators power to reverse the general rule of law, by which the personal property of an unmarried woman becomes, upon her marriage, *primâ facie* the property of the husband. It

seems a fair subject of speculation whether this decision may not lead to inconvenient results. The current of modern authorities is the other way. In addition to the cases cited in argument in the principal case, see *Tullett v. Armstrong*, 1 Keen, 428.

against alienation is part of the trust for separate use. That trust is only a creature of a court of equity, and originates in a desire to protect a woman in contracting a marriage. The object of it is not to put a perpetual restraint upon her acts.

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Mr. Boteler, in reply.—All the cases which have been cited are those of legacies to a woman's separate use, with or without power of anticipation. The clause against anticipation has been held to be bad, and the gift to the separate use, simply, has been held by the Vice-Chancellor to be good. This is the case of a lady, who being sole, executes a deed, by which she vests her own property in trustees, for her separate use during her life, and not to be subject to the debts of any husband she might marry, with a clause enabling her to dispose of the property by will after her death. That indenture was sanctioned and confirmed by the husband whom she does marry; a circumstance which alone is sufficient to support the deed, even if the Vice-Chancellor's decision be wrong. The husband acts upon it and adopts it, and complains of no fraud. It is to all intents and purposes the same as if he had been a party to it. In the case of the *Countess of Strathmore v. Bowes* (a), a deed of this nature was established against Bowes, the husband, although he had no notice of it, and complained of fraud. Here the husband absolutely sanctions the deed.

With reference to the Bankrupt Act the question is, whether, when the deed was executed, the grantee of the annuity did not elect to consider the wife not a surety but a principal, and whether he did not pay the money to her upon that understanding. Considering, however, the wife as a mere surety, the 54th section of the statute only shews that the annuity creditor is *entitled*, not *bound*, to prove against the bankrupt. He may rely on the estate

(a) 1 Ves. jun. 22.

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and not on the bankrupt. The legislature could not intend to deprive the creditor of that remedy. The "value" of the annuity under the 54th section is not equivalent to the annuity itself. [*Alderson, B.*—Supposing the annuity to be charged on the estate of the bankrupt, your argument is well founded; you may hold the annuity and not prove. But if charged on the estate of the collateral surety, he is not bound by this clause of the statute to pay you more than the value. The object of the statute was to make the bankrupt a free man, by enabling his estate to pay off the annuity debt; not to compel the surety to pay it off, and to stand in the situation of the annuitant. Your present argument makes the bankrupt liable in future. Your better argument is that the wife is not a surety].

ALDERSON, B.—If I could be satisfied that the wife was a collateral surety, I should say that the plaintiff ought to have proved under the fiat. But I do not at present see that she is a surety. With respect to the other point, it does not appear that the deed of settlement was made in contemplation of a particular marriage; therefore, as it may be necessary for me to give my opinion upon the question which has been so much litigated, I will defer my judgment until a future day.

Dec. 12th.

ALDERSON, B.—In this case I took time to consider a question of great nicety, on which the most eminent authorities were supposed to have entertained different opinions. I was apprehensive that it might have become necessary for me fully to weigh and consider them, in order that I might come to a conclusion, whether I would adopt the one or the other as the basis of my present judgment.

The defendants contend that the suit is defective for want of parties, inasmuch as the assignees of the defendant Hobbs had a clear interest in the fund, the subject of the dispute; and were, therefore, entitled to be heard.

And no doubt that would follow, if the assignees had any claim.

It appears that, in the year 1828, Mrs. Hobbs, then Miss Brook, assigned over the stock in question to the two defendants, Willis and Gray, as trustees, in trust for her sole and separate use and benefit, independent of any husband with whom she might intermarry. Upon looking through that deed, which contains no gift over in favour of any other person, it would follow that it could not prevent Miss Brook, at any time before her marriage, from requiring a re-assignment of the stock by the trustees; nor after her marriage could it prevent her, jointly with her husband, from successfully making the same claim. The case of *Wallwyn v. Coutts* (a) shews that a mere voluntary trust of this sort may at any time be varied by the party making it, at his own pleasure. And the case of *Newton v. Reid* (b) shews, that on application by husband and wife, a transfer would be directed of the fund. It may be also true that the husband might have had a right, without the assent of his wife, to claim the fund; subject, however, to the care which a court of equity would take in case there was no other sufficient settlement upon the wife. But this case turns, as it seems to me, on the confirmation of this voluntary settlement by the husband, on the occasion of the grant of the annuity to the plaintiffs. By that deed, the husband not only affirmed what had been previously done by the wife, but gave, so far as he could, an interest to the plaintiff consequent thereupon, as a security for the advance of 300*l*.

After this, I think the husband could not have set up his right as husband to the fund in question, nor had his assignee any right to interfere—at any rate so far as the interest of the plaintiff is concerned; which is the only question with which I have to do at present.

(a) 3 Mer. 708.

(b) 4 Sim. 141.

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I am therefore of opinion, that, subject to the claim of the prior incumbrancer, the plaintiff should have a decree, and that his costs should be paid out of the fund, if sufficient. He must pay the costs of the prior incumbrancer, with a like remedy over for those costs against the fund.

Decree accordingly.

Nov. 8th,
Dec. 12th.

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In a bill, to which a plea of purchase for valuable consideration without notice might be pleaded, it is not necessary to charge notice; and if the plaintiff does charge notice, it is sufficient for him to charge it generally, without averring facts as evidence of the charge. Therefore, under a general charge of notice, evidence of particular facts and conversations may be given.

The testimony of one witness, though uncorroborated by circumstances, is a sufficient ground for a decree, if the answer deny the fact upon belief only, although the answer be positive, and there are no other means of contradicting the fact.

IN 1793, James Hughes, the father of the plaintiff, executed a mortgage of certain property situate at Conway, in the county of Carnarvon, and of which he was seised in fee, to Richard Lloyd, for the term of 500 years, for securing the repayment of 100*l.* and interest. In June, 1795, James Hughes, in contemplation of a marriage which was soon afterwards solemnized between him and Alice Griffith, settled the mortgaged premises upon himself for life, with remainder to the use of his intended wife for life, with remainder to trustees upon trust to preserve the contingent remainders, with remainder to the use of such child or children of the marriage for such estates, &c. as James Hughes should by deed or will appoint; with remainder, in default of appointment, to the use of the first and other sons of the marriage successively in tail.

About the year 1808, James Hughes sold part of the settled premises to one Badcock, who took possession of them; and in 1815, Badcock still being in possession of them, sold them to the defendant, Mrs. Garner, for 250*l.* In this transaction John Evans, since deceased, acted as the solicitor for the defendant, and prepared the deeds of conveyance, which were indentures of lease and release, executed by Badcock of the one part and the defendant of the other part, and dated respectively the 9th and 10th October, 1815.

James Hughes, having survived his wife Alice, died in the month of January, 1834, without having executed the power of appointment limited by the settlement. He left the plaintiff, his eldest son and heir in tail.

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The bill, after stating the foregoing facts, and also that the mortgage had been paid off by James Hughes, who had taken no assignment of the term, but that the defendant had afterwards taken an assignment of it in trust for herself, prayed that the defendant might be restrained from setting up that term in bar of an action of ejectment which had been brought against her by the plaintiff.

The bill charged that the defendant pretends that she was a purchaser of the premises without notice of the plaintiff's claim, or else that she was a purchaser from some person who purchased without notice, whereas the plaintiff charges the contrary to be the fact, and that it was well known, suspected, or believed when the defendant's alleged purchase took place, that James Hughes was only tenant for life of the premises, or at least had no power to convey the fee, and so it would appear if the defendant would set forth a true statement of the abstract which had been delivered to her or her attorney previous to such alleged purchase, and what appeared upon it; and also a statement of what deeds were delivered to her, &c. That John Evans was employed by the defendant as her attorney to transact the alleged purchase, and to investigate the title for her, and that he prepared the conveyance, and also the assignment of the term to her trustee, and that while he was so employed as her attorney or solicitor, he had various conversations with James Hughes relative to the deeds of settlement of June, 1795, and that he had notice given him, or he knew, believed, or suspected, that the contents were such as described in the plaintiff's bill.

The defendant by her answer admitted that she had purchased the premises of Badcock, who was in possession of them, and who had represented himself to be the owner of

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them in fee ; that upon the advice of her friend, counsellor N., she had employed John Evans as her attorney to conduct the purchase, and that Evans prepared the deeds of conveyance, which were afterwards perused and approved of by counsellor N. She denied, however, that Evans had prepared the deed of assignment, inasmuch as the term had not been assigned to her trustee until after the plaintiff had commenced his ejectment, when, the existence of this term being ascertained, the deed by which it was assigned was prepared by Mr. Lloyd, who was then her attorney. She denied that she, or, to the best of her belief, John Evans, or any of her agents, had ever had notice or had ever heard of the settlement of 1795, or had ever any reason to suspect or believe its contents. She also denied that any abstract of title, or any deeds or papers connected with the title, had ever been delivered to her, or, as she believed, to Evans. She further denied, to the best of her belief, that any conversations such as were charged in the bill had taken place between Evans and Hughes, though, if such had taken place, she insisted that they ought not to affect her, inasmuch as they related to matters independent of any transaction of business between Evans and the defendant.

In support of the plaintiff's case, the evidence of Mr. Henry Rumsey Williams, the plaintiff's solicitor, was read. He stated that he well knew John Evans ; that in July, 1815, Evans was employed for the defendant in investigating James Hughes's title to the premises ; that in the course of that investigation he applied to Hughes for leave to peruse the settlement of 1795, and that accordingly Hughes mentioned the subject to the deponent ; that some doubt being suggested by Hughes as to the propriety of producing it, the deponent advised him to produce it ; that in consequence of what passed between the deponent and Hughes, the deponent, in the presence of Hughes, shewed Evans the settlement ; that Evans read it, and after he

had finished reading it, said that counsellor N. had advised, and would advise, on the title, for Mrs. Garner, and that she would act accordingly.

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Mr. *G. Richards*, for the plaintiff.

Mr. *Simpkinson*, and Mr. *Girdlestone*, for the defendant.—The defence is, that Mrs. Garner is a purchaser for a valuable consideration without notice. In order to meet that case by anticipation, the bill suggests that she pretends she is a purchaser for valuable consideration without notice, whereas the plaintiff charges the contrary: and one question will be, whether under that charge the plaintiff can be let into evidence of the particular facts which the witness Rumsey Williams deposes to. Then, in order to make out a case of a particular notice, and to shew that the general allegation of the defendant is not correct, the plaintiff goes on to charge that it was well known at the time of the alleged purchase that James Hughes was only tenant for life, and also that Evans, from his conversations with Hughes, had special notice to that effect. But not one of these special charges is supported by evidence. The whole of Rumsey Williams's testimony goes to prove a totally distinct issue. He speaks to conversations, not between Evans and Hughes, but between Evans and himself. His evidence, therefore, is quite beside the issue tendered by the bill, and ought not to be received in support of the special charges, more especially as those charges, as well as the general charges, are distinctly denied by the answers.

It comes then to the question, whether the general allegation that the plaintiff had notice is sufficient to let in Rumsey Williams's evidence? Now notice is only an inference drawn from certain facts, and those facts must be charged. In *Hall v. Malby* (a), the plaintiff claimed by

(a) 6 Price, 240.

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his bill the tithe of sheep, which he alleged had been improperly removed from the parish, with the intention of defrauding the plaintiff, and the bill contained a charge of fraudulent removal. The defendant denied the charge. The plaintiff then went into evidence, and examined witnesses, who swore not only to the removal, but to an admission by the defendant that he had made the removal with intent to defraud the plaintiff; but *Richards*, C. B., said that he should entirely lay out of the case all that had been sworn as to the declaration of the defendant, because nothing of the kind was stated in the bill. *Hall v. Maltby* is supported by other decisions, which shew that the Court will not admit evidence to support a mere general charge, amounting only to an inference of fact: *Mulholland v. Kendrick* (a), *Anon.* (b), *Margareson v. Saxton* (c). [Mr. *Richards*.—*Hall v. Maltby* refers only to confessions. It has been decided, that if you state your fact you are at liberty to give evidence of conversations to support it: *Small v. Attwood* (d)]. If a fact is put in issue, you may possibly give conversations in evidence to support it; but not if you only put in issue an inference arising from unknown facts. If that could be done, it would follow, that in almost every case where fraud or notice is charged, the defendant could not meet it. A charge of notice must be dealt with in the same way as a charge of fraud. Is a defendant to come to prove a negative without one fact charged? It happens that Evans is dead, and Rumsey Williams has it all his own way: but suppose Evans was living, there is nothing in the bill to lead the defendant to meet the facts now offered in evidence. What is there to induce the defendant to examine Evans as to the settlement having been shewn to him? [*Alderson*, B.—Certainly the Court could not decide on

(a) 1 Molloy, 359.

(b) 1 Molloy, 363.

(c) 1 Y. & C. 625.

(d) Dom. Proc. 1836.

this testimony, if Evans were living, without directing an issue. There is that in your favour]. The death of Evans cannot alter the necessity of stating facts on the record. [*Alderson, B.*—All the facts within the defendant's personal knowledge ought to be charged. To that extent the cases go, no doubt. But here, even if the record had given the defendant the opportunity of speaking upon the fact suggested, she could only have spoken as to her belief. Evans being dead, I think I must decide the question of fact myself]. If your Lordship is of opinion that the defendant is wrong in law, it comes to the question whether a decree can be made upon this evidence. All the facts from which the inference is drawn are denied. The evidence is such as could only be met by a general denial, and if so, will the Court put the case in a state of further investigation? Now a decree will not be pronounced, or an issue directed, on the evidence of one witness contradicting the answer, without corroborating circumstances. [*Alderson, B.*—The notice denied by the defendant is not inconsistent with notice to her attorney]. If the Court thinks fit to direct an issue, it is submitted that there ought to be an order that the answer be read at the trial of the issue. It will be read, not as evidence, but as a declaration on oath, to enable the jury to judge which party speaks the truth: *Ibbotson v. Rhodes* (a). [*Alderson, B.*—That is a strange decision, for if the answer does not satisfy the Judge, why should it be supposed to satisfy the jury?] *Keen v. Cant* (b), *Pember v. Mathers* (c), and *Milton v. Edgeworth* (d), are authorities to the same effect. Upon the whole, we submit, first, that Rumsey Williams' evidence ought not to be read; secondly, that if read, it is not of sufficient weight to contradict

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(a) 1 Eq. Ca. Abr. 229, pl. 13; Hill's MSS.

2 Vern. 554.

(c) 1 Bro. C. C. 52.

(b) 17 June, 1743; Serjeant

(d) 5 Bro. P. C. Toml. ed. 313.

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the answer; thirdly, that if there be any doubt, an issue ought to be directed, with an instruction that the answer be read at the trial on the defendant's behalf.

Mr. *Richards*, in reply.—The plaintiff claims as a purchaser under the indentures of 1795, and has an equal equity with the defendant. It is said that notice has not been duly charged; but, in fact, notice need not have been charged at all. Where a bill is filed to restrain the setting up an outstanding term in bar of an ejectment, the Court will grant relief in all cases except one—that of the defendant being a purchaser for valuable consideration without notice. Suppose this defendant had so pleaded; did any one ever hear of any other than an ordinary replication? When you reply to a plea, you do not charge evidence; you reply generally. It is clear, therefore, in this instance, that, supposing there had been no other charge than the first, the plaintiff would have been able to enter into evidence of notice. It is immaterial whether *Rumsey Williams'* evidence supports the charge of conversations between *Hughes* and *Evans*, because there is a substantive charge that *Evans* had notice. The cases which have been cited in support of the argument, that the facts from which notice is inferred must be charged, apply only to admissions.

Dec. 12th.

ALDERSON, B.—In this case, the prayer of the plaintiff's bill is that the defendant may be restrained from setting up, as a defence at law, an outstanding term which she has got in, to protect her from an action of ejectment at the suit of the plaintiff. It appears that the plaintiff claims as eldest son and heir of *James Hughes*, under a settlement made by him before his marriage with *Alice Griffith*. The settlement is dated 20th June, 1795. The defendant has purchased this estate by a subsequent conveyance, for a valuable consideration.

The rule in equity is, that a person claiming under a subsequent deed cannot set up a prior outstanding estate, unless he be a purchaser for valuable consideration without notice. That must, therefore, be made out by the defendant; and the plaintiff is fully at liberty, I think, in answer to that defence, to shew any facts establishing notice. I am of opinion, therefore, that on these pleadings I ought to hear the evidence of Mr. Henry R. Williams, although the facts there deposed to are not charged in the bill. Then, if so, is notice to the defendant made out? In her answer, she denies all notice; and if the facts sworn to by Mr. Williams were opposed by the defendant's oath in her answer, I ought not to determine between the two conflicting oaths. But they are not inconsistent with each other. The notice sworn to by Mr. Williams is one to the attorney of Mrs. Garner, and if that were not mentioned to her, her answer would be perfectly true. But notice to her attorney is, in effect, notice to her. It is said she purchased from Badcock. If she purchased from Badcock with notice, then, in order to make a good defence, she should go further, and shew that Badcock purchased for valuable consideration, and without notice. But this defence is neither suggested nor proved.

I have carefully looked at Mr. Williams's deposition, and it is full and clear on the point of notice. I think the plaintiff should have the decree he prays; but, under all the circumstances, without costs.

Decree accordingly.

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The decree so pronounced was drawn up and passed on the 23rd January, 1837, and enrolled on the 9th of February following. After the enrolment some conversation took place between the plaintiff's Clerk in Court and the defendant's solicitor, in the course of which the latter said, that the defendant intended to petition for a rehear-

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The Court will not vacate the enrolment of a decree, on the mere ground that it was obtained with extraordinary haste.

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ing. The plaintiff's Clerk in Court replied that in that case the defendant must give notice of his intention to the plaintiff's solicitor or Clerk in Court. The defendant accordingly gave that notice; but the plaintiff having refused to act upon it,

Mr. *Simpkinson* and Mr. *Girdlestone* now moved that the enrolment might be vacated, on the ground that it had been made with improper speed. They cited *Anon.* (a), *Kemp v. Squire* (b), *Anon.* (c), *Parker v. Dee* (d), and *Stevens v. Guppy* (e). In *Manners v. Bryan* (f), before Lord *Lyndhurst*, there was no breach of confidence on the part of the solicitor who enrolled the decree, but only extraordinary speed, and yet his Lordship ordered it to be vacated. The vacating enrolments is discretionary with the Court; indeed it may be doubted whether enrolment is necessary at all in this Court. In the Court of Chancery the decree is signed by the Vice-Chancellor and Chancellor; but the statutes relating to the Equity jurisdiction of the Court of Exchequer take no notice of enrolment; and it is laid down by some authorities that it is not the practice of this Court to enrol: *Dodson v. Oliver* (g), *Seton on Decrees* (h).

Mr. *G. Richards*, *contra*.—The defendant does not say that any surprise was practised upon her. There was a period between the 24th of January and the 9th of February, during which she might have taken the ordinary mode of entering a *caveat*. She does not say that she intended to do so. The question is concluded by authority: *Barnes v. Wilson* (i), *Balguy v. Chorley* (k). Even

(a) 1 Ves. sen. 326.

(b) 1 Ves. sen. 205.

(c) 1 Vern. 131.

(d) 3 Swanst. 529, n.

(e) Turn. & Russ. 178.

(f) Not reported.

(g) 1 E. & Y. 755.

(h) P. 395.

(i) 1 Russ. & Mylne, 486.

(k) 1 M. & K. 640.

if the defendant had given due notice that she meant to proceed to a rehearing, that would not prevent the enrolment; but here the decree was enrolled before the conversation in question took place.

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Mr. *Simpkinson*, in reply.—It is clear, even from the modern cases which have been cited, that vacating the enrolment is entirely discretionary with the Court. Lord *Hardwicke* went further than modern judges, and vacated enrolments entirely on the ground of rapidity in obtaining them. *Barnes v. Wilson* is at variance with *Manners v. Bryan*, decided by the same learned judge. Enrolment in this Court is of rare occurrence.

The LORD CHIEF BARON. If the present question stood upon principle merely, or upon the early cases only, I should be much disposed to grant the present motion. The number of interests and of facts comprised in a suit in Equity, is frequently so great that it behoves the judge to use every possible caution in seeing that nothing material is omitted in the decree; and I presume that it is on that account that after a decree has been pronounced, a Court of Equity, almost as a matter of course, upon certificate of counsel, grants a rehearing. It would certainly be very inconvenient, if in every case the party seeking to vary the decree should be compelled to file his bill of review, or enter his appeal, when he might have all that he wishes by a rehearing. On that ground I am disposed to think that Lord *Hardwicke* took a wise view of the question; and that where it is *bond fide* the intention of a party to rehear a cause, it is in the discretion of the Court to vacate the enrolment.

But the modern cases on this subject, in the Court of Chancery, are very strong and of a contrary complexion. Therefore, before I decide upon this motion, I must consult those authorities. I should say, however, that con-

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siderable latitude is allowed to all Courts, in the regulation of their own practice. In matters of law they take the authority of other Courts as binding upon them; but that observation does not apply so strictly to questions of practice.

Upon a subsequent day his Lordship said that he thought the defendant ought to have entered a *caveat*, and upon the authority of the cases cited for the plaintiff, he refused the motion.

Motion refused.

Nov. 11th.

CROPPER v. KNAPMAN.

Under the usual decree against an executor to account, the Master is not at liberty to investigate a disputed account arising out of partnership transactions between the testator and the executor, the latter swearing that the balance is in his favour; but, under such circumstances, the plaintiff may have relief by supplemental bill, without exhibiting an interrogatory in the original suit for the examination of the executor.

THE original bill was filed in 1831, by the residuary legatees under the will of William Gibbon, against Knapman and Gibbon, the executors under that will, praying for an account of the personal estate and effects of the testator which had come to their hands; that after the payment of the debts and legacies the residue might be ascertained, and paid to the plaintiffs, according to their respective interests; and that, in taking the account, the defendant Knapman might stand charged with the sum of 627*l.*, with interest thereon at 4*l.* per cent. from the 1st of July, 1828, which sum was alleged to be due from Knapman to the testator, at the time of his death, for money lent, &c.

Knapman, by his answer, denied the debt, but stated that he and the testator had been engaged together in a certain building speculation, upon which he had originally advanced 627*l.*; that part of this money had been repaid in the course of the several transactions between him and the testator mentioned in the schedule to his answer, but

Where one of two executors was a partner

with the testator, the residuary legatees may sustain a bill for an account of the partnership transactions against the executors, though collusion between them is neither charged nor proved.

*See answer of two executors
 answer. 2d bill
 H.
 Bill by a
 is a debt on estate as a debtor
 to the testator. The Court
 having sent to the jurisdiction
 a bill against the party opposite.
 v. Knapman, & Knapman.
 One law. M.S.D. p. 273.*

that there yet remained a balance due to him from the estate of the testator of 85*l*.

The cause came on for hearing before Lord *Lyndhurst*, in February, 1834, when a decree was made, referring it to the Master to take the common account. No order was made with respect to the alleged debt of 627*l*.

In taking the accounts before the Master, the above sum of 627*l*. was claimed by the plaintiffs, as the balance of the partnership account in the hands of Knapman. On the other hand, Knapman denied the debt, and claimed the balance before referred to of 85*l*.; and upon his objection, that the Master, under the decree, had no authority to take the accounts connected with the building speculation, the Master declined going into them. No interrogatory with respect to these accounts was exhibited before the Master, nor was any special application made to the Court for that purpose.

Under these circumstances, a supplemental bill was filed against Knapman, and his co-executor Gibbon, to render effective the object of the original bill. After charging that Knapman had been applied to by the plaintiffs, but had refused to come to a full account of his receipts and payments in respect of the above building speculation between him and the testator, and that the other defendant, his co-executor Gibbon, refused to take any proceedings against him to compel him to come to such account, &c., the bill prayed that an account might be taken of all monies received and paid by Knapman and the testator respectively, on account of the above speculation, that the balance due from Knapman might be ascertained, and that he might be charged with such balance in taking the accounts directed by the decree in the former suit, the plaintiffs being willing, in the taking of the accounts under such decree, that credit should be given to Knapman for what, if anything, should be found due to him from the estate of the testator, in respect of

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the joint speculation; and that the bill might be deemed and taken as and for a supplemental bill to the original bill, &c.

Knapman, by his answer to this bill, denied that the plaintiffs had applied to him to account, or that he had refused to comply with such application, except as before stated; and Gibbon denied collusion with Knapman, or that he had been applied to, or had refused to take proceedings to compel him to come to such account. He stated, that he was a stranger to the matters inquired after, and submitted that he ought not to have been a party to the suit, and that the bill ought to be dismissed against him, with costs.

Knapman dying in August, 1835, the suit was revived against his executors.

Mr. *Simpkinson* and Mr. *Sutton Sharpe*, for the plaintiffs.—If the original bill had been framed so as to entitle the plaintiffs to an account of these building transactions, it is clear that the mere circumstance of the defendant's swearing that the balance was in his favour would not prevent the plaintiffs from having the account: *Knebell v. White* (a), *Davenport v. Davenport* (b), *Dominicetti v. Latti* (c). That being so, the question is, whether this decree, which omits to direct an account essential to the justice of the case, ought to stand? It is submitted that the defect may be cured by a supplemental bill: *Misf. Pl.* 61, *Simmons v. Gutteridge* (d), *Jones v. Jones* (e), *Dormer v. Fortescue* (f). This is a debt in the hands of Knapman. The affairs of the testator cannot be fully wound up without this account. If any balance is due from Knapman, that is, in the contemplation of a court of equity, actual assets received. And it is immaterial how

(a) Ante, p. 15.

(b) 1 Sim. 512.

(c) 2 Dick. 588.

(d) 13 Ves. 262.

(e) 3 Atk. 110.

(f) 3 Atk. 124.

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it is received. It is said that this bill cannot be sustained by residuary legatees, unless the co-executor collude with or refuse to sue the debtor executor. But suppose the co-executor for a long series of years has not sued, and says that nothing is due; that is the best proof that he refuses to sue. Besides, even if he had sued his co-executor, the defendant might have objected that the residuary legatees were not made parties. Putting, however, the case of co-executors out of the question, suppose a man engaged in a partnership transaction dies without coming to a settlement with his partner, and his executor refuses to sue the partner, alleging that nothing is due; are the residuary legatees to be bound by his opinion? In such a case it is not necessary to prove direct fraud in the executor. If he will not take steps for the recovery of the debt, the residuary legatees may; otherwise an insolvent executor would always have power to prevent the legatees' redress, by interfering between them and the accounting party. How does the present case differ from that, except in this circumstance, that here the party who is charged as debtor, and who was partner with the testator in this building transaction, was himself one of the executors? The rule that residuary legatees cannot sustain a bill against a debtor to the estate without proof of collusion between him and the executor, applies no more to this case than the other. It has never been held that it is necessary to prove collusion where the debtor to the estate is himself one of the executors. Whether the debt was incurred by a sole executor, or one of many executors, is immaterial. In the latter case, the residuary legatees have an equal right with the co-executor to call him to account in a court of equity for his receipts and payments. Here, part of Knapman's receipts was a sum due from him to the testator. Of that he became, by the fact of his executorship, trustee for the residuary legatees. In the case of a stranger debtor, there is no privity

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between him and the residuary legatees, and for that reason the legatees cannot call upon him to account. But the case is quite different where the executor is himself the debtor.

With reference to the pleadings, if the original bill had been so framed as to enable the plaintiff to obtain this account, the defendant should, upon the filing of the present bill, have pleaded that matter in bar, or raised that defence by his answer. He does not, however, say, by his pleadings, that the first suit protects him, and he cannot now raise that objection at the bar. The first suit, however, never could have protected him. The plaintiffs have a right to have the accounts taken as between the executors, and also in respect of the partners. Where justice cannot be obtained in the original suit, whether the new matter arise before or since the original suit, that is the case for a supplemental bill. This is in the nature of an original bill, except so far as engrafting the debt of Knapman on the accounts in the other suit. The fact, whether Knapman will have to pay the plaintiffs, will depend on the balance of accounts in the other suit. The event of this suit, should the plaintiffs succeed, must be rendered contingent on the accounts in the first suit.

Mr. *Temple* and Mr. *Blunt*, for the defendant.—The original suit and this suit cannot be connected, and the parties ought not to be put to the unnecessary expense of this suit. The original decree was right. It was for a general account against the two executors. *Simmons v. Gutteridge* points out the rule to be adopted in these cases. Under the original bill Knapman was bound to account, and the plaintiff might have exhibited an interrogatory before the Master to ascertain whether Knapman was or not indebted on a particular account. If the Master refused to admit the interrogatory, then it might have been proper to have had a supplemental bill. In *Simmons*

v. *Gutteridge*, Lord *Erskine*, after observing that a debt due by the executor to the testator's estate is assets, and that therefore an interrogatory should in all cases be pointed to the inquiry whether he has assets arising from such a debt, proceeds to say—"If the answer to that interrogatory is, that there is a long account, and he cannot say that the balance is against him, the Master must take that answer, and a bill must be filed." Such a case as that, however, is a special case, and not this case. All that is meant to be said is, that upon special circumstances involving long accounts, the parties may come before the Court by bill. They must, therefore, either pledge themselves by affidavit that there is such an account, or give some evidence of it, before they involve the testator's estate in useless expense. Here there is a mere suggestion against the defendant's positive oath. The Master has not made his report, and the plaintiffs may at this moment apply for an interrogatory, on the authority of *Simmons v. Gutteridge*; but they cannot do so without some evidence. [*Alderson, B.*—The case of *Simmons v. Gutteridge* is only to the effect that if the plaintiff choose to put the interrogatory, that is the ordinary course. But here the defendant is adverse to that course: why, then, should the plaintiffs not file their bill at once? Why should they be compelled to go through an unmeaning ceremony?] An executor indebted to his testator's estate is not like a common debtor. The testator has placed confidence in him, and the Court will not permit a bill to be filed against him except in an extreme case. The testator says that the executor's oath is to be sufficient for the guidance of the Court in relation to his affairs. It is said, that if Gibbon had filed his bill against Knapman alone, the latter might have said that the residuary legatees were necessary parties. That is not so. The reason why residuary legatees may file a bill against a sole executor is that the sole executor cannot sue himself. But where there are several execu-

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tors, one may sue another in equity, and the residuary legatees are not necessary parties. But then it is said that there is collusion between the executors; there is, however, no express allegation to that effect, and without such an allegation the bill is demurrable. [Alderson, B.—Where is your authority for that proposition? If you satisfy me that allegation or proof of collusion is necessary, I shall dismiss this bill]. *Prima facie* the party having the legal estate is the party to sue; and therefore, in the case of two executors, and a third person debtor, the two executors must sue; but if one of the executors is from circumstances not in a situation to sue, the only protector left is the other executor. The rule of a Court of Equity is that those parties only shall appear upon the record who are necessary to protect particular interests. The residuary legatees had a clear right to sue Knapman *quà* executor, but not *quà* debtor. In the latter character the co-executor alone was entitled to sue him. [Alderson, B.—In *Simmons v. Gutteridge*, Lord *Erskine* says, that if the executor cannot answer whether a balance is due from him to the testator's estate, a bill must be filed. According, therefore, to your argument, that is a bill by a co-executor, and not by legatees]. That is the inference to be drawn from that dictum; and it is submitted, that even such a bill could only be filed upon a special case made that the executor would not or could not act in the original suit. Here the executor can act in the original suit. Another circumstance is, that the plaintiffs have taken a decree to revive the original suit, and they have filed this bill as an original bill, in the nature of a supplemental bill. If in this suit they prove the defendant to owe 100*l.* on the building transaction, they may have the costs of this suit against him; and yet, in the other suit, he may shew that there is a balance in his favour. The Court therefore ought, at all events, to retain this bill till the accounts are taken in the other suit, and see what evidence there is

against him. His oath is to be taken *prima facie* in his favour. The plaintiffs come too soon with the supplemental suit.

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Mr. *Simpkinson*, in reply.—*Bowsher v. Watkins* (a) is an express authority to shew that the plaintiffs have a right to sue the debtor executor without charging collusion with the co-executor. [*Alderson*, B.—Where there is an equitable demand, which cannot be enforced at law, it is not necessary to charge collusion with the executor; and this will be the case, *à multo fortiori*, where the accounting party is the executor. That appears to have been Lord *Hardwicke's* opinion in the case referred to, in *Bowsher v. Watkins*. Now here there is an equitable demand against the executor]. It is clear that the legatees may enforce that demand against him. It is no answer to this to say that the co-executor might have filed a bill. It is not denied that he might; but if he had, he must have made the residuary legatees parties. If not, the only result would have been that the defendant would have insisted that his right to retain was equal to the plaintiffs' right to sue.

The objection as to the costs of this suit is immaterial, because the plaintiffs only ask that this may be considered as a supplemental bill, and may be brought before the same Master as the original bill.

ALDERSON, B.—I do not think that this is a case of collusion; but it appears to me that the plaintiffs are entitled to the relief which they pray, against the defendants Knapman and Gibbon. It appears that the original or first bill was filed by the plaintiffs against Knapman and Gibbon, the two executors of William Gibbon the testator, for the purpose of having an account taken of the assets of the testator which had come

(a) 1 Russ. & M. 277.

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to their hands. On that occasion there was a special charge made by the bill, that Knapman had received a sum of 627*l.*, the amount of a debt due from himself to the estate of the testator; and that, on taking the account, he ought to be charged with that sum. Now, by his answer, he expressly negatived this debt, and on the other hand, he stated, that instead of any sum being due from him, there was a balance of about 80*l.* due from the testator's estate to him. In that state of the case the cause came to be heard before Lord *Lyndhurst*, and he was satisfied with the answer of Knapman, and directed an account to be taken before the Master in general terms, excluding the debt of 627*l.* Subsequently the parties went before the Master, and, on that occasion, the plaintiffs claimed the same amount of debt, when the Master, in the execution of Lord *Lyndhurst's* decree, excluded this sum from his consideration, it appearing that this sum of 627*l.* was claimed, not as a debt due in the ordinary way, for money lent to Knapman, but as the balance of an account between Knapman and the testator, upon a joint speculation in buildings, in which they must be considered partners, and in that respect liable in equity to account the one to the other, but in no respect liable at law. Under these circumstances, there being no charge in the bill of any account to be taken between Knapman and the estate of the testator, the Master and Lord *Lyndhurst* excluded its consideration, and treated it as coming within the rule laid down by Lord *Erskine* in *Simmons v. Gutteridge*, that a bill must be filed for the purpose of taking such an account, unless the executor admit explicitly that the debt is due to the testator's estate.

In consequence of this defect in the original bill, a supplemental bill has been filed, in order to give the parties an opportunity of making that case from which they were excluded by the form of the previous bill. A supplemental bill, according to the authorities, may be filed for the pur-

pose of supplying defects in the original bill, and even in aid of the decree. This seems to fall within that principle; it is a bill filed to supply a defect in the former bill, and in aid of a decree pronounced by Lord *Lyndhurst*, between legatees on one side and executors on the other. It is admitted that if this bill is properly filed, the answer of the executors gives the plaintiff a right to this account. The defendants do not state any thing in their answer, which excludes the account from the Master's office; and the moment they admit an open account of this nature, it becomes convenient for a Court of Equity to adjust it finally. Therefore, without pronouncing what may be the ultimate result, I shall direct it to be taken as prayed by the bill.

I think that *Gibbon* should have his costs in this suit.

I do not think that it was necessary to charge collusion between the defendants. The executor of an executor who was a partner is out of the rule.

Decree accordingly.

BAINBRIDGE v. Lord ASHBURTON.

CB 203
BY the will of Lady G. Beauclerk, certain real estates were vested in Aubrey, Earl of Burford, Thomas Brand, and Alexander Adair, and their heirs, upon certain trusts for the benefit of the plaintiffs. The will contained a direction that upon the death or refusal to act of either of the trustees therein named, or of any future trustee or trustees to be appointed for the purposes therein mentioned, or any of them, a new trustee or trustees should from time to time be named or chosen by such trustees, or the survivors or survivor of them, in order to continue and carry on the same trusts; to the end that there might always be three persons in being for the support and management of the affairs of the said trusts.

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 Trustees, after devising certain real estates to different persons, gave and devised all his real estates, not before disposed of by his will, to A. B., his heirs, executors, administrators, and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit:—*Held*, that, under this devise, the trust estate passed.

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The trustees all died without ever having executed the power of appointing new trustees. Mr. Adair, who was the survivor of them, by his will, after devising certain specific real estates to various persons, gave and devised all his real estates, not thereinbefore otherwise disposed of, unto the defendant, Lord Ashburton, described in the will as the testator's godson Alexander Baring, his heirs, executors, administrators, and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit.

The defendant having declined to appoint a new trustee, on the ground that, under the circumstances, the power of appointment was no longer capable of being carried into effect, the present bill was filed for the purpose of having a new trustee appointed, and that the defendant might convey the trust property to him; and the only question was, whether the trust estates were devised to the defendant by the will of Mr. Adair.

Mr. *Simpkinson* and Mr. *Heberden*, for the plaintiffs.—The principle is, that under general words in a will, a trust estate will pass unless a contrary intention can be collected from other parts of the instrument: *Marlow v. Smith* (a), *Ex parte Sergison* (b), *Roe d. Reade v. Reade* (c), *Lord Braybroke v. Inskip* (d). The cases, which seem at first sight at variance with this principle, in reality support it: *Duke of Leeds v. Munday* (e), *Attorney-General v. Butler* (f), *Ex parte Brettell* (g), *Ex parte Morgan* (h), *In re Horsfall* (i). In the majority of those cases, in which it was held that the legal interest in the trust estate did not pass to the devisee, there was either a direction to pay

- (a) 2 P. W. 198.
- (b) 4 Ves. 147.
- (c) 8 T. R. 118.
- (d) 8 Ves. 417.
- (e) 3 Ves. 348.

- (f) 5 Ves. 339.
- (g) 6 Ves. 577.
- (h) 10 Ves. 101.
- (i) 1 M'Clel. & Y. 292.

debts, or legacies were charged on the estate, or there were other words from which it was to be inferred that all the estates coming to the devisee were to be enjoyed by him beneficially. Any words however, to have that effect, must be very clear and precise. In *Ex parte Brettell*, a general residuary devise to the testator's natural son and his heirs, "to and for his and their own proper use and behoof," was held by Lord *Eldon* not to pass a trust estate. But in the subsequent case of *Lord Braybroke v. Inskip*, Lord *Eldon* explained that the mere words "own use and behoof," &c., would not affect the general rule, unless there were other parts of the will which had that tendency.

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Mr. *De Gex*, for the defendant, submitted to the judgment of the Court.

ALDERSON, B. —In *Lord Braybroke v. Inskip*, Lord *Eldon* put the case upon this ground, that in order to prevent the trust estate passing to the devisee, there must be words to confine the devisee to that property in which he was to have the beneficial interest; and he explains the case of *Ex parte Brettell*, as not turning merely upon the words "to his own use and behoof," but upon the circumstances of the case. The devise was to an infant, who was the testator's natural son, and Lord *Eldon* thought, that taking the whole will together, the testator intended the devisee to take an estate which he could enjoy as beneficially as he could his own.

Here the words of the will are very general, and there is nothing to prevent the Court from putting upon them as large a construction as possible, in order to give effect to the intention of the testator. It would be a very minute distinction to draw any line between the words "benefit" and "behoof." The decree must therefore be as prayed.

Decree accordingly.

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Ex parte ANNESLEY—In the Matter of the STRATFORD BRIDGE Improvement Act.

Under the stat. 60 Geo. 3, c. 12, lands belonging to the parish are vested in the churchwardens and overseers of the parish, as a corporation.

Therefore, where feoffees to charitable uses were empowered to sell and convey their lands to the commissioners under an improvement act:—*Held*, that the petition for the investment of the purchase money should be presented in the names of the churchwardens and overseers of the parish in which the charity was established.

Scilicet, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue to receive the dividends of stock, notwithstanding fluctuations in the number and identity of the members of the corporation.

UNDER an act passed in the 9th year of the reign of King George the Fourth, for maintaining and repairing the bridge over the river Avon, near Stratford-upon-Avon, all bodies politic, corporate, or collegiate, corporations aggregate or sole, tenants in tail or for life, husbands, guardians, trustees, feoffees in trust for charitable and other purposes, committees, executors and administrators, &c., are authorized, for the purpose of carrying the act into execution, to sell and convey any houses, buildings, lands, tenements, and hereditaments of which they may be seised in fee simple to the commissioners appointed by the act. The act then directs that the purchase money (exceeding 200*l.*) shall be paid into the Bank of England, with the privity of the Accountant-general of this Court, to his account, "*Ex parte* the commissioners for repairing the bridge," &c., to be applied in the purchase of lands to be settled to the like uses, &c., and that in the meanwhile, and until such purchase shall be made, the money shall be invested in the name of the Accountant-General in the purchase of 3*l.* per cent. Consolidated or 3*l.* per cent. Reduced Bank Annuities; the dividends from time to time to be paid, by order of the Court of Exchequer, to the person or persons who would for the time being have been entitled to the rents and profits of the lands thereby directed to be purchased.

Under the will of Sir Hugh Chesnall, Knt., certain freehold messuages and lands situate at Stratford-upon-Avon were, at the time of the contract after mentioned, vested in six persons, as feoffees in trust for the relief of the poor of the parish of Clifford Chambers. In 1834, a contract was entered into between the feoffees and the commissioners under the act, for sale of part of the

premises, consisting of a blacksmith's shop, with its appurtenances, to the commissioners, at the price of 185*l.*, and soon afterwards a proper conveyance to the commissioners was executed by five of the feoffees, (the other refusing to join), and the purchase money was paid into Court.

A petition was afterwards presented, in the name of the rector of the parish of Clifford Chambers and the feoffees, praying that until an eligible purchase of lands could be found the purchase money might be invested in the purchase of 3*l.* per cent. Consols, in the name of the Accountant-general, and that the dividends might be paid to the petitioners; and an order was made to that effect. It occurred, however, to the counsel for the petitioners, that a difficulty would arise from the unwilling feoffee refusing to join in appointing an attorney to receive the dividends. Accordingly, the order not having been drawn up,

Mr. *Faber* applied to the Court to vary the order, by directing the dividends to be paid to the feoffees, or any of them, or such person as they or any five of them should appoint.

The LORD CHIEF BARON said that the charity estates were taken out of the feoffees by the stat. 59 Geo. 3, c. 12, s. 17 (*a*), and vested in the churchwardens and overseers

(*a*) Which enacts, "That all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish re-

spectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered, to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and heredita-

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of the parish; and he suggested that the petition would probably, on that account, require amendment. His Lordship referred to *Doe d. Jackson v. Hiley (a)*.

The petition was accordingly amended, by making the churchwardens and overseers of Clifford Chambers co-petitioners with the willing feoffees, striking out the name of the unwilling feoffee, and praying that the investment might be made in the names of the churchwardens and overseers, and that the dividends might be paid to the rector of the parish for the time being.

Mr. *Faber*, on mentioning the petition again, stated that it was proposed to pay the dividends to the rector, in order to avoid the expense of a new power of attorney upon every change of churchwardens and overseers.

ments belonging to such parish," &c. The words, "belonging to such parish," are to be taken in their popular sense: *Doe v. Terry*, 4 Ad. & Ell. 274.

(a) 10 B. & C. 885. In *The Attorney-General v. —*, 7th April, 1837 (*ex relatione*), it appears that the Vice-Chancellor held that the 59 Geo. 3, c. 12, did not apply to copyholds. A reference had been directed to the Master to appoint trustees for a charity estate, consisting of copyholds, and to approve of a new scheme. The Master refused to appoint trustees; holding, on the authority of *Doe v. Hiley*, that the copyhold was vested in the churchwardens and overseers; but he approved of a scheme. The report was excepted to, on the ground that he ought to have appointed trustees; but that, if the copy-

holds vested in the churchwardens and overseers, then that the Court had no power to direct a scheme. The Vice-Chancellor said, that it would be very extraordinary if copyholds could be vested in the churchwardens and overseers as a corporation under the act, as it would deprive the lord of all his fines; and whatever might be the case as to freeholds, which it was not necessary for him to consider, the Court of King's Bench had not decided that copyholds were within the act, and he certainly should not do so. The exceptions were allowed, and it was referred back to the Master to review his report. His Honour seemed to doubt the authority of *Doe v. Hiley*: it has, however, been treated as law in *Doe v. Terry*, 4 Ad. & Ell. 274; *Doe v. Cockell*, Id. 478.

The LORD CHIEF BARON asked whether the act, which made the churchwardens and overseers a corporation for these purposes, did not give them a common seal, under which they might appoint an attorney, whose office would not cease on a change in the body. Upon referring to the act, however, this appeared not to be the case, and accordingly his Lordship made the

Order as prayed.

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WILLIAM SMITH, by his will, after directing payment of his just debts, &c., gave, devised, and bequeathed all his real and personal estate, whatsoever and where-soever, unto his daughter, Ann Smith, and three other persons, their heirs, executors, administrators, and assigns, upon trust, out of the rents, dividends, and produce of his said real and personal estate to raise and pay certain annuities, and amongst them an annuity of 10*l.* per annum to his grandson, Frederick Smith, for his life, and an annuity of 35*l.* per annum to his son, Henry Sweeting Smith, for his life; which latter annuity the testator directed his trustees to pay into the proper hands of his son by monthly, quarterly, or half-yearly payments, at their discretion, and so as his receipt only should be a discharge, and not the receipt of any assignee or assignees under any authority derived from him; and upon further trust to pay and divide the surplus income and produce of his said real and personal estate unto and equally between his children respectively, save, as therein mentioned, as to the share of his son Joseph Smith. And from and after the decease of his said children, the testator directed that his said trustees should receive and take the rents, issues, and produce of all his said real and personal estate and

The circumstance that the party who has the administration of the testator's real and personal effects is an uncertificated bankrupt, and was not appointed to his office by the testator, is not a sufficient reason to induce the Court to appoint a receiver before answer, where several of the parties interested decline to join in the application.

Quære, how far parties, claiming in different interests, can join as plaintiffs in a bill of revivor and supplement?

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effects, and pay and divide the same unto and equally between all his surviving grandchildren who should then be living, share and share alike, until the youngest should attain twenty-one years ; and upon the youngest of them attaining such age, upon trust that they the said trustees, and the survivors and survivor of them, should sell and dispose of all his said real and personal trust estate and effects, and turn the whole thereof into ready money, and pay and divide the same, with such parts thereof as should consist of monies and securities for money, unto and equally between all such of his said grandchildren, and the children or child of any such grandchild as might be then dead, leaving lawful issue ; such children or child to take only his or their parent's share. And the testator appointed Ann Smith and the three other trustees to be his executors.

The testator died in November, 1824, leaving several children surviving him, amongst whom were Henry Sweeting Smith, his eldest son and heir-at-law, and Ann Smith, his daughter. Ann Smith proved the will in May, 1825, and took upon herself the execution of the trusts, and entered into possession of the real and personal estates. The other executors renounced probate, and by deed disclaimed the trusts. Ann Smith died in October, 1834, having previously made her will, whereby she appointed William Bevan and John Farr her executors. The latter alone proved the will, the former renouncing probate.

In Trinity Term, 1835, Frederick Smith, the testator's grandson, filed his bill against John Farr, and against the children and other grandchildren of the testator, praying that accounts might be taken of the testator's personal estate, and of the rents and profits of his real estate come to the hands of Ann Smith and John Farr, or either of them ; that a receiver might be appointed ; that Farr might be restrained by injunction from further interference with

the testator's property, and that the rights and interests of the several parties might be ascertained.

In October, 1835, Frederick Smith died, and soon afterwards the present bill was filed by his widow, who was his administratrix, and his infant children, against the same parties as were defendants to the original suit, praying that the former suit might be revived ; that the arrears of Frederick Smith's annuity might be paid to the widow ; that under the circumstances stated in the bill, the defendant Henry Sweeting Smith might be decreed to account for all sums received by him on account of the real and personal estate of the testator, and might be restrained from collecting or receiving any part of that estate ; and that a receiver might be appointed, &c.

The present bill charged that the plaintiffs had discovered that upon the death of Ann Smith letters of administration *de bonis non* of the testator, William Smith, had been granted to the defendant, Henry Sweeting Smith, and that, by virtue of such letters, he had entered into possession of the testator's personal estate, and had also, as the testator's heir-at-law, entered into the possession of the real estates. The bill then contained charges against Smith, of which the details are contained in the affidavits hereafter referred to.

The defendant not having yet put in his answer, a motion was now made for a receiver, upon the affidavits of Joseph Smith, one of the testator's sons, M. A. Smith, the widow of Frederick Smith, and other persons. Those affidavits stated that the defendant, having upon Ann Smith's death come into the rents and profits of the testator's estate, immediately changed his residence, and lived at much greater expense than before ; that he had constantly refused to pay the share which Ann Smith, if living, would have been entitled to, of the dividends and rents, to the parties interested therein, or to pay the arrears of Frederick Smith's annuity to his widow ; that the defendant had very

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little property beyond what he was entitled to under the will, and his half-pay as a lieutenant in the local militia, and that he was an uncertificated bankrupt; that Frederick Smith occupied a house belonging to the testator, for which, at the time of this motion, there was due 146*l.* for rent; that, on the other hand, at the death of Ann Smith, there was due to F. Smith 100*l.* for the arrears of his annuity; that the widow was ready and willing to pay the difference (46*l.*), but was afraid of so doing by reason of the embarrassed circumstances of the defendant; that the defendant had, in October, 1836, distrained the goods of the widow for 178*l.* rent, which goods were replevied; that the defendant had misapplied the monies of the testator, and if permitted to continue in the receipt of them, the greater part would be lost to the estate of the testator, &c.

The defendant, by his affidavit, denied all the allegations on the other side as to the change in his mode of living, except that he admitted having changed his abode on Ann Smith's death, for the purpose of more conveniently administering the testator's estate. He stated that shortly after the death of Ann Smith, he, as her heir-at-law, with the full consent and approbation of the several adult parties interested, either on their own behalf or that of infant children, received the rents and profits of the testator's real estate, and administered his personal estate which had been left unadministered; and that his brother, Joseph Smith, the deponent on the other side, was one of his bondsmen on taking out letters of administration *de bonis non*. That all which the deponent had received of Ann Smith's share had been paid by him to the parties entitled, but that part of it had not been paid over to him. That in addition to the rent, which he stated to be 178*l.*, there was a debt due on an unsettled account between the estate of Frederick Smith and that of the testator. That the deponent had always paid the annuities as soon as due, and frequently in advance. He then stated that he was

possessed of income beyond what he took under the will and his half-pay; but he admitted that he was a bankrupt thirty-eight years ago, and he could not recollect whether he obtained his certificate; he stated, however, that shortly after his bankruptcy he entered his Majesty's service, and that his affairs were settled by his father.

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Mr. *Simpkinson* and Mr. *Kenyon Parker*, for the motion. This is not the case of an application against an executor or trustee appointed by the testator himself. In that case it would be more difficult to object that the party was in embarrassed circumstances or a bankrupt; for if the testator chose to appoint such a person, no one, probably, would have a right to complain. But this is the case of a person upon whom the trusts of the will have devolved by operation of law, and in whom, as it appears on the face of the will, the testator had no confidence. In bequeathing the annuity of 35*l.* to this son, the testator studiously guards against the payment of it to any person except to the party himself, giving the trustees a discretionary power to dole it out as occasion might require,—either weekly, monthly, or quarterly (*a*). The affidavits establish that the party is an uncertificated bankrupt, and has little or no property, and that upon the receipt of the testator's property he changed his house and mode of living. Besides, he has omitted to pay the annuities. This is a strong case. The application is made on behalf of almost all the parties beneficially interested; and under such circumstances, independently of the fact of bankruptcy, the plaintiffs are entitled to a receiver: *Brodie v. Barry* (*b*). The point as it relates to an uncertificated bankrupt, has also been decided: *Gladdon v. Stoneman* (*c*). In these cases the receiver was appointed before answer. Here, though the party

(*a*) But the same clause was added to the bequests to other annuitants.

(*b*) 3 Mer. 695.

(*c*) 1 Madd. 143.

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has not put in an answer, he has answered the plaintiffs' affidavits.

Mr. *Piggott*, for defendants entitled to annuities in possession and shares in the residue.—The testator never intended that Henry Smith should have any controul over the rents and profits. The language of the will is very strong to that effect. Where a trustee or executor appointed by a testator becomes bankrupt after the date of the will, although the fact of bankruptcy is known to the testator, a receiver will be appointed: *Langley v. Hawk (a)*. Here the trust was not imposed upon the party by the testator, but by operation of law.

Mr. *G. Richards* and Mr. *Puller*, for the defendant, Henry Sweeting Smith.—If at the hearing it is impossible for the plaintiffs to have a decree, your Lordship will not make an *interim* order for a receiver. This suit has been attempted to be revived on the death of Frederick Smith, the plaintiff; the new plaintiffs being the widow and children of Frederick Smith. But the suit so revived is irregularly framed, the plaintiffs not having a common interest. The children take by substitution, and cannot therefore join as plaintiffs with the widow, who claims through Frederick Smith. The bill therefore, as the record now stands, must be dismissed at the hearing, and on that ground alone this motion ought to be refused.

Another ground on which the Court will dismiss this application is, the nature of the interest of the parties who make it. Now, one of the plaintiffs, the widow, has no interest in the rents and profits. She claims the arrears of an annuity, but having been in possession of the testator's property, she has satisfied herself what was due for arrears. So far from being entitled as representative to

(a) 5 Madd. 46.

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any portion of the rents, she admits that there is a debt of 46*l.* due from her. What interest then has she in this application? The other plaintiffs are the great-grand-children of the testator. They have no claim upon the rents and profits now; though they have an interest, but only a contingent interest, in the *corpus*. It is not said, however, that the defendant has mismanaged the rents. Some only of the defendant's brothers concur in this application. They who do ought to have filed a cross bill, and the defendant would then have had their responsibility for costs.

With respect to the personalty, there is no allegation that any personal estate is now outstanding. The letters of administration were obtained by the defendant so far back as 1824, and it is not said that he did not then perform his duty as administrator. Besides, the very man who now attempts to throw a slur upon his character was his bondsman to the Ecclesiastical Court. No application was made for a receiver till after a distress was put in. It was well known to all parties that he was an uncertificated bankrupt; his bankruptcy having occurred thirty-eight years ago.

Mr. *Simpkinson*, in reply.—The question as to the widow is not, whether she had an interest when the bill of revivor was filed; but, whether her husband had an interest when he filed the original bill. If he had, and there were arrears of the annuity at his death, those arrears were property received by his widow as his personal representative. Now, it is not said that when the bill of revivor was filed, the annuity had been all paid to Frederick Smith. On the contrary, it appears upon both affidavits that there was an arrear to the amount of 100*l.* His representative, therefore, had an interest to take the accounts *quoad* that arrear, more especially when it is sworn, and not denied, that the defendant has actually dis-

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trained upon her for the whole of the rent due from her, without giving her any credit for the arrears of the annuity. With respect to Frederick Smith's children, it is true that they have no present interest to be paid the rents and profits, but they have an interest to see the rents and profits properly applied. If the annuities are not kept down by the trustee under the will, and he appropriates them to his own use, might not the annuitants come for satisfaction on the *corpus* of the estate or on the reversion; upon the surplus or residue?

The objection as to the misjoinder of the plaintiff is immaterial. It is said that the widow and children cannot be plaintiffs in the same bill, the former claiming by representation, and the latter *proprio jure*. But as to her this is a bill of revivor, as to them a bill of supplement, arising from matters which have occurred since the filing of the original bill. Suppose a bill filed in reference to real estate, and the plaintiff devises it to A. B., and dies. A. B. has a right to file a supplemental bill, or an original bill in the nature of a supplemental bill, to have the benefit of the proceedings in the former suit: he cannot file a bill of revivor, not representing the original plaintiff. Now, if the original bill respects personal as well as real estate, then the new bill would adopt the form of this. It would be a bill of revivor by the personal representative, and an original bill in the nature of a supplemental bill by the party entitled to the realty. If Frederick Smith had lived, he would have been entitled as one of the testator's grandchildren; but under the will his share devolves to his children, and that brings the case within the principle referred to. It is true that his children take but a limited interest, but that is not enough to deprive them of the right to this application. A bill was filed in Chancery by a person whose sole interest was this—that the testator by will directed that he should receive the rents of a certain property, and be allowed a poundage to be

paid by the executors. Lord *Eldon*, however, held that a bill was sustainable by that party against the executors for an account, receiver, and injunction. The plaintiff there had only a *scintilla* of interest, but Lord *Eldon* said that, small as it was, he had an interest to support the claim.

Whatever may be the allegations of the bill as to the outstanding personal estate, the defendant admits that he has received, since the death of Ann Smith, the rents and profits of the leasehold estates.

The LORD CHIEF BARON.—I do not feel myself called upon to decide the question how far this bill has been properly filed as a bill of revivor and supplement, or how far the parties have been properly joined as plaintiffs: my opinion proceeds on the ground that this motion is made without any sufficient reason, before any answer is put in; it being admitted that such an application must be made on special circumstances. The case which has been referred to in support of the motion states, that where all parties interested concur in the application, it may be made. It says, the receiver was appointed, all parties being before the Court and consenting. Do all consent here? First, they say that the defendant is interested—of course he does not consent. His brothers are interested, and some of them do not consent. It appears to me that that alone is a sufficient answer to this application. It must be a strong case to induce the Court to dispossess a party who is interested, and who has the legal title, unless the other parties consent. It is very true, that the mode in which he came possessed of the property, particularly if he had not the legal title, might, under ordinary circumstances, give rise to objections, because, taking the property as he did, after he had been dispossessed of it by his father, and upon surviving his sister, there might be sufficient ground for raising questions prejudicial to his character. But when you look at the circumstances of the case, you do

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not see that he labours under the odium of volunteering his services on this occasion. It is true that the father did not make him his executor, and seems to have had some doubt about the assignees' interest interfering to deprive him of the benefits of the will, because that clause in the will, which has been referred to, looks as if the testator doubted whether a proper provision would be made for his son if his share was given to him absolutely. But that was in the year 1822, and the son took possession twelve years after—namely, in 1834; and when he took possession, it is not alleged that he was objected to; and one of the parties interested was actually his surety to the Ecclesiastical Court: therefore the circumstances of his taking possession are not so prejudicial to him as they would otherwise be.

Then, when the three trustees have renounced, and his sister is dead, what is to be done? He is the only person who can interfere. He must do so for the benefit of others, if not for his own. He has himself an interest; he has a share of the rents and profits during his lifetime. Then what are the facts which have occurred since his possession to induce any one to say that the consent of these parties to his possession was improperly given, or that these parties ought now to be hostile to him? When did he change his mode of living? Not till 1834. The affidavits say, that upon coming into possession he changed his residence and adopted a more expensive mode of living. That naked fact alone is not sufficient to support this application. The objection, if any, was existing when the supplemental bill was filed, but not before. When did this new mode of living operate upon the minds of the parties? No new fact is alleged, except the defendant's change of residence, and his living on another part of the property. It appears, therefore, to me, that there is a want of a body of facts for the purpose of supporting the present proceeding.

What may be the nature of the case, when the answer is put in, I do not know: but when it is considered that this was an amicable bill, I do not know why I should step out of the usual course to appoint a receiver against the defendant in possession. It must be a strong case to authorize such a proceeding. I have already said that the general statement of the change in his mode of living is not sufficient for such a purpose. In addition to that, there are no specific statements of the defendant's misapplication of the property; and no statement that the annuities were not paid up to the time of the bill being filed. There is no fact, therefore, to induce the Court to change the possession, except the distress. Upon that, I admit that the plaintiff, Mrs. Smith, may be entitled to have an account taken, and to have an acquittance, and to set off the money due to her husband's estate for the arrears of the annuity. Still it appears, by her own affidavit, that she owes 46*l.* to the testator's estate, and there being unquestionably a sum due for rent, the defendant distrained. Under these circumstances, I see no reason why he should not have distrained, or why that proceeding should now operate to his prejudice. I confess it appears to me that this application is founded on some little resentment; and as there are no circumstances against the defendant now which did not exist when the bill was filed, or before it was filed, I think the motion must be refused, with costs.

Motion refused.

WILKINSON *v.* L'EAUGIER.

July 1st.

THE plaintiff having obtained the common injunction, the defendant put in his answer, and obtained, on the 20th June, an order *nisi* to dissolve the injunction. On the

The plaintiff may shew exceptions for cause against dissolving the common injunction.

tion, although he may have given notice of shewing cause on the merits; and it will be sufficient if the exceptions are filed before cause is actually shewn.

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24th June the plaintiff gave notice to the defendant that he would shew cause on the merits against dissolving the injunction. On the 27th June, the day on which cause was to have been shewn, the Court did not sit. The plaintiff then gave notice to the defendant that he had abandoned his intention of shewing cause on the merits, and meant to shew exceptions for cause; and on the 28th of June he filed his exceptions, and obtained the usual order thereon.

Mr. *James Russell* and Mr. *Beavan*, for the defendant, now moved that the order of the 28th of June might be discharged for irregularity, with costs; contending, first, that the order *nisi* was imperative that unless cause was shewn on the 27th the injunction should be dissolved; and, secondly, that if the plaintiff, under the circumstances, was at liberty to shew cause after the 27th, he was bound to shew the same cause as he would have shewn if the Court had sat on the 27th, and therefore it must be upon the merits, and not by way of exceptions.

Mr. *Simpkinson* and Mr. *James*, *contrà*.—It is sufficient to shew cause on the first day on which cause can be shewn: *Jadis v. Ruscoe* (a). It is likewise immaterial whether the cause shewn be on the merits or by way of exceptions; for although two days' notice is necessary for shewing cause on the merits, that does not apply to exceptions; nor does the order *nisi* state *what* cause is to be shewn. [The *Lord Chief Baron*.—The question is, whether you ought not to have filed your exceptions on the 27th.]

Mr. *Russell*, in reply, contended that the situation of the parties ought not to be affected by the accidental circumstance of the Court not sitting on the day appointed

(a) 1 Younge, 538.

for shewing cause. He cited *Pikehouse v. Hickman* (a) and *Goodman v. Whitcombe* (b).

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The LORD CHIEF BARON.—The plaintiff could not comply literally with the terms of the order *nisi*, because the Court did not sit on the 27th of June. It is admitted, that if the Court had sat on the 27th, the plaintiff would have been within the time to shew cause. Whether a party, for the purpose of shewing cause, can avail himself of a matter which occurred after the day appointed for shewing cause, may be doubtful; but here, the matter existed on that day. If it had occurred afterwards, I should feel the force of the objection, that he could shew no cause on the 28th, which he could not on the 27th. But the real cause here is, that there is no sufficient answer. That existed at first; and, supposing I had sat here on the 27th, all that was necessary to have been done was to file exceptions. Now, the plaintiff originally thought that he would shew cause on the merits, but he afterwards changed his mind, and decided on shewing exceptions for cause, thinking that as long as the Court did not sit he was quite in time if he had his exceptions ready before he came to shew cause. That is the fact, and the only question is, whether the exceptions ought not to have been filed on the 27th. Now, for the reasons I before stated, I think that he was in sufficient time, although the exceptions were not filed till the 28th. It appears to me, therefore, that the order of the 28th was properly made, and that the present motion must be dismissed: but as there is no decided case upon the point, it must be dismissed without costs.

Order accordingly.

(a) Not reported.

(b) 1 J. & W. 589.

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July 9th.

Upon an action brought to recover a sum of money lent upon the security of an I. O. U., and upon a bill filed to discover whether the money had not been lent for the purpose of gaming:—
Held, that the defendant was bound to state by his answer whether it was so lent; it being still a question open to argument in a court of law, whether money lent at play, or for the purposes of play, is recoverable in an action at law.

The bill stated that early in the year 1834, the plaintiff, being then resident at Paris, occasionally visited a club or gaming-house, called the *Salon des Etrangers*; that the defendant, L'Eaugier, was a member of the club, and superintended, and participated in the profits of the gaming; and that he was in the habit of making loans to the persons present to enable them to continue their play; that the plaintiff had from time to time borrowed of the defendant various sums of money for the purpose of gaming, which had uniformly been repaid; that on one occasion, having borrowed of the defendant 2000 francs, he gave the latter his I. O. U. for the amount; that on the following day, or soon afterwards, the plaintiff repaid the 2000 francs to the defendant, but omitted to take back the I. O. U.; that notwithstanding such repayment, the defendant had, upon the return of the plaintiff into this country, commenced an action upon the I. O. U. in the Court of King's Bench, for the purpose of recovering the amount of the 2000 francs and interest. The bill then prayed that the I. O. U. might be delivered up to be cancelled, and for an injunction to stay proceedings at law.

The bill having interrogated whether the sums therein mentioned were not, and particularly whether the sum of 2000 francs was not, employed by the plaintiff for the purpose of gaming, and the defendant having answered equivocally upon that point, an exception was taken to his answer.

Mr. Simpkinson and *Mr. James* for the exception.

Mr. James Russell and *Mr. Beavan*, *contrà*, contended that it was not necessary for the defendant to answer the question, it being perfectly immaterial to the case made by the bill: for, admitting the transaction to be illegal in this country under the statute of Anne (a), it was not illegal at Paris.

(a) 9 Ann. c. 14.

The LORD CHIEF BARON.—In *Robinson v. Bland* (a), Lord Mansfield decided that money lent at play is recoverable in an action, notwithstanding that the security itself upon which the money is lent is void under the statute of Anne; and he accordingly held that the contract in that case, which was made in France, might be enforced here. I always respect Lord Mansfield's opinions, and received my first legal impressions from his judgments; but I have lived to see many of his decisions overruled, as in the case of assurance of enemies' property, which he held to be legal, on the notion that assurance is a beneficial traffic, and ought not to be repudiated, but which has been decided by all other judges to be illegal. I cannot therefore take it for granted that the judges would decide this case as Lord Mansfield decided *Robinson v. Bland*, though I own I should decide it the same way. Upon this consideration, if the party is desirous of trying the question at law, I do not think he ought to be precluded from so doing. With great reluctance, therefore, I must allow the exception.

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Exception allowed.

(a) 2 Burr. 1077.

The defendant by his answer stated that the *Salon des Etrangers* was a club established for the usual purposes of a club-house, and that games of chance with dice and cards were there carried on; that such games are recognised by the laws of France; that the defendant was an attendant at the club at a fixed salary; that the plaintiff applied to the defendant, who was in one of the refreshment rooms of the club, for the loan of 2000 francs, which the defendant lent him upon his written acknowledgment; that this sum was not lent for any particular purpose, and that the defendant did not know whether the plaintiff applied it to gaming purposes, though he might have

Nov. 22nd.

Quære, whether money lent for the purpose of gaming is recoverable in an action at law, and whether an I. O. U. is a security within the statute 9 Anne, c. 14?

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done so. The defendant denied that the 2000 francs had ever been repaid to him.

The plaintiff having obtained the common injunction, and an order *nisi* having been obtained to dissolve it,

Mr. *Simpkinson* and Mr. *James* now shewed cause against dissolving the injunction.—There is sufficient ground of suspicion in this case to induce the Court not to dissolve the injunction. It is clear that the sum in question was lent for the purpose of gaming, which distinguishes this case from that of *Robinson v. Bland*. In *Robinson v. Bland* there was no finding by the jury that the money was lent for the purpose of play. The question therefore, whether money so lent is recoverable in an action, was not before the Court. That question, however, came before the Court of Common Pleas, in the case of *Davis v. Viola* (a), in which the case of *Robinson v. Bland* was commented upon. That was an action on the case upon promises brought for the purpose of recovering money lent at play. There were counts upon promissory notes and money counts. The plaintiff was unable to prove the defendant's signature to the notes, but called a witness to prove the amount of the money lent, as acknowledged in the notes, and five guineas besides. Under all the circumstances, the Chief Justice left it to the jury to say whether the money had been knowingly lent or advanced for the purpose of play, and, if so, he directed them to find for the defendant. The jury found a verdict for the defendant, and the counsel for the plaintiff moved for a new trial, on the ground that the contract was not within the statute of Anne, but the Court refused the application. In another case, which occurred before Mr. Justice *Gould*, his Lordship was of the same opinion as the Court of Common Pleas. No argument can be raised on the other side that the money having been legally lent in France may be re-

(a) E. T. 1784, Hill's MSS.

covered in England, because it seems clear that money lent for the purpose of gaming is not recoverable in France: *Code Civil*, Arts. 1964, 1965. At all events, even if the Court should think the action maintainable on the money counts, the void instrument must be delivered up to be cancelled.

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Mr. *James Russell* and Mr. *Beavan*, *contrà*.—The Court can come to no conclusion upon the question of foreign law, because that is a question of fact to be determined by the Master. However, the articles which have been cited from the *Code Civil*, refer only to money lost and won, not to money lent at play (*a*). With respect to the written security, the plaintiff may have a right to have it delivered up to be cancelled, if the defendant fail at law; but if he obtains a verdict, there is no equity confessed by the answer upon which the Court will order the instrument to be delivered up.

The LORD CHIEF BARON.—If I had any satisfactory evidence of what the law of France was, I should be disposed to enter fully into the question which has just been argued. But there is not sufficient in these pleadings for the Court to proceed upon; and I agree with Mr. *Russell* in thinking that a more distinct case ought to be raised by the bill and answer in order to determine the question in equity. As to the written instrument, I see no reason why I should now order it to be delivered up to be cancelled, for it is not precisely similar to other instruments which have been made use of in transactions of this nature. There is a difference between a bill of exchange, which is negotiable, and an I. O. U., which is only evidence of the debt.

Injunction dissolved.

(*a*) The conclusion drawn from them by a learned commentator is in these words: "Le joueur qui n'a pas payé ce qu'il a perdu ne

peut être forcé à le payer; et le joueur qui a reçu ce qu'il a gagné ne peut être contraint à le rendre." *Code Civil*, par Rogron, p. 902.

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Nov. 22nd.

LEWTHWAITE v. CLARKSON.

If, upon demurrer for want of parties, the plaintiff give notice of submitting to the demurrer within two days before the day on which the demurrer is set down for argument, he cannot amend his bill without a special application for that purpose.

Submitting to a demurrer for want of equity, puts the bill out of court, and it can only be restored under special circumstances.

RUTH CLARKSON, one of the defendants to this suit, had filed a demurrer for want of parties, and Robert Field and Ruth his wife, and Eliza Clarkson, three other defendants, had filed a demurrer for want of equity, and these demurrers were set down to be argued on the 10th November. Briefs to argue the demurrers had likewise been delivered to the defendants' counsel on the 8th. On the 9th November the plaintiff's solicitor gave notice to the defendants' clerk in court that the plaintiffs submitted to the several demurrers; and shortly afterwards a further notice was given that the plaintiff's counsel had obtained an order to amend his bill by adding parties, or otherwise as he might be advised, upon payment of 30*s.* costs to Ruth Clarkson, and the like costs to the other defendants.

A motion was now made to set aside the order so obtained for irregularity, with costs, or that the plaintiff might pay the taxed costs of the demurrer.

Mr. *Spence*, for the motion, insisted, with respect to the demurrer for want of parties, that the bill could not be amended as of course, where the demurrer had not been submitted to at least *two* days before the day for argument: 1 *Fowl. Pr.* 320: at all events, after having been set down for argument it could only be amended upon payment of taxed costs: *Downes v. East India Company* (a), *Anon.* (b). With respect to the demurrer for want of equity, he contended that the plaintiff's submission put the bill out of Court as against the two defendants who so demurred; and, therefore, that the bill must be taken to be dismissed as against them, with full costs. And for this he cited *Kirkly's Orders*, p. 6, where it is stated that "if the demurrer be to the whole bill, and allowed or submitted to, the defendant is to stand dismissed with costs."

(a) 6 Ves. 586.

(b) 9 Ve. 221.

Mr. *Monro, contra*.—It must be admitted that, to amend a bill after demurrer allowed for want of equity, requires a special application; but that is not the case where the demurrer is only for want of parties. Although a demurrer for want of parties has been set down for argument, a plaintiff may amend without a special application until it is actually argued. The only substantial question in these cases is the costs. Here, the plaintiff has obtained an order to amend as against all the defendants, and the only real question is, whether he shall pay 30*s.* or full costs. The defendants themselves are of that opinion, for their motion is in the alternative—either that the order to amend may be discharged, or that the plaintiff may pay them the taxed costs of their demurrers.

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The LORD CHIEF BARON.—How could the plaintiff have proceeded upon his bill if the demurrer for want of equity had been allowed? It is clear that he could not have amended a non-existing bill. The question therefore is, whether by submitting to the demurrer he should be allowed an advantage which he otherwise could not have obtained; and it seems to me, that according to the strict practice of the Court, he should not. If the matter had been originally brought to my notice, I should certainly not have allowed the amendments as a matter of course; at the same time, under the circumstances, I am desirous that the expense of a new bill should be saved. Therefore, upon payment of the costs of the demurrer for want of parties and of this application, let the order stand for amending the bill for want of parties, and let the demurrer for want of equity be set down for argument.

Order accordingly.

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By fine and settlement made after marriage, certain lands, of which the wife was seised in fee before the marriage, were conveyed to her separate use for life, with remainder to the use of such person or persons as she, notwithstanding her coverture, should appoint; with remainder, in default of appointment, in trust for herself for life, with remainder to her two daughters in fee. The wife afterwards joined with her husband in the deposit of the title deeds of the premises, by way of equitable mortgage, for securing the repayment of the husband's debts:—*Held*, that the deed of settlement gave the wife no power of appointing in fee, and that the mortgagees had no claim upon the estate as against the two daughters.

On this day the demurrer of the defendants Robert and Ruth Field and Eliza Clarkson, came on for argument.

The bill stated that by indentures of lease and release, dated in August 1815, and a fine duly levied in pursuance thereof, certain estates situate in the county of Westmoreland, were conveyed by Thomas Clarkson and Ruth his wife to John Clarkson and Henry Sill and their heirs, to the use of the said Ruth Clarkson for her natural life, to and for her own sole and separate use and benefit, or to the use of such person or persons as the said Ruth Clarkson, by writing under her hand, should at any time, notwithstanding her then present or any future coverture, direct or appoint, and in default of such direction or appointment upon trust to pay the rents and profits of the said premises unto the proper hands of the said Ruth Clarkson, during her life, for her sole use and benefit, wholly independent of the said Thomas Clarkson; and from and after the decease of the said Ruth Clarkson, leaving the said Thomas Clarkson her surviving, to the use of the said Thomas Clarkson and his assigns during his life; and from and after the decease of the survivor of them the said Thomas Clarkson and Ruth his wife, to the use of Ruth Clarkson (afterwards Ruth the wife of Robert Field) and Eliza Clarkson, the daughters of the said Thomas Clarkson and Ruth his wife, their heirs and assigns, as tenants in common; and after the decease of either of them the said Ruth Clarkson and Eliza Clarkson, the daughters, to the use of the survivor of them, her heirs and assigns; and in case of the decease of the said Ruth Clarkson and Eliza Clarkson, the daughters, under the age of twenty-one years, and without issue then living, to the use of the right heirs of the said Ruth Clarkson the mother.

The bill then stated that on the 14th February, 1831, Thomas Clarkson and his wife borrowed of the plaintiff the sum of 240*l.*, and that for securing the repayment thereof with interest, Thomas Clarkson executed a bond

to the plaintiff, and Ruth Clarkson deposited with him the indentures next mentioned; and that she signed and gave to him the following memorandum in writing, viz.:—"Be it remembered, that on the 14th day of February, 1831, the several deeds and writings enumerated and specified in the schedule hereunder written were delivered by Thomas Clarkson of &c., yeoman, and Ruth his wife, to Thomas Lewthwaite of &c., innkeeper, in pledge to secure to the said Thomas Lewthwaite, his executors, administrators, and assigns, the repayment of the sum of 240*l.* this day lent and advanced by the said Thomas Lewthwaite to the said Thomas Clarkson and Ruth his wife, and interest for the same after the rate of 4*l.* 10*s.* per cent. per annum. As witness the hands of the parties, the day and year first above written.

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" Schedule.

" 12th and 13th February, 1787—Indentures of lease and release, the release made between Christopher Wilson of the first part, James Wilson of the second part, and James Jenkinson of the third part."

The bill then stated, that by the last-mentioned indentures the premises were conveyed to the use of James Jenkinson in fee simple, and that James Jenkinson died, having devised the premises to his daughter, the said Ruth Clarkson, then Ruth Jenkinson, in fee simple.

The bill then alleged that Thomas Clarkson had, at different times, with the consent of his wife, borrowed several other sums of the plaintiff, namely, 100*l.* on his bond, 60*l.* on his promissory note, and another 60*l.*, which had been procured by the plaintiff from one Willan, for which the plaintiff and Clarkson had given Willan their joint promissory note; that it was expressly agreed that the deposit of deeds already mentioned should remain as a security for these debts, as well as the original debt; that the sum of 34*l.* 6*s.* only had ever been paid in reduction of the whole debt; that Thomas Clarkson had died intes-

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tate and insolvent, and that no person had taken out letters of administration of his effects.

The bill prayed that it might be declared that the memorandum operated as an appointment of the hereditaments to the plaintiff, by way of equitable mortgage, for securing the sum of 240*l.*, with interest, &c., and that the plaintiff was entitled to tack the after-borrowed sums to the original sum; that an account might be taken of principal and interest due to the plaintiff, and that payment might be made, or the defendants stand absolutely foreclosed; but in case the Court should be of opinion that the defendant Ruth Clarkson had only power to appoint the premises during her life, then that, in default of payment, she might be decreed to make to the plaintiff an absolute appointment or demise of the premises for her life, &c.

To this bill the defendants, Robert and Ruth Fields, and Eliza Clarkson, demurred; first, for want of equity, and, secondly, because neither the legal personal representatives of Thomas Clarkson nor those of Willan were parties to the bill. The second ground of demurrer, as has been already seen, was not contested.

Mr. *Spence* and Mr. *Rogers*, for the demurrer, were stopped by the Court.

Mr. *Monro*, for the bill.—The limitations in this deed are to the wife for her life, *or* to the use of such person or persons as she shall appoint; and in default of appointment, there is another limitation to the wife for her life. This shews that it was intended she should have an absolute power of appointment in fee. If the power is to be considered as extending to her life only, it is altogether a useless limitation. The deed must be taken most strongly against the grantor, and effect must be given to all the clauses. There are no words limiting the operation of

the power to such uses as she shall appoint during her life; therefore, as the subsequent uses are only to take effect in default of appointment, they cease upon her exercising the power in favour of the plaintiff.

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The LORD CHIEF BARON.—The deed contains no limitation in favour of such persons as the wife shall appoint in fee. It only means that she may designate certain persons, to whom she may appoint during her life, and that construction is aided by the words both before and after the power of appointment. The two daughters cannot be affected by any appointment she makes. It is a very plain case.

Demurrer allowed: bill dismissed with costs.

Monro then suggested that the defendants should make some application to dismiss the bill.

The LORD CHIEF BARON.—No: the demurrer, for want of equity, being allowed, the bill stands dismissed.

See *Field v. Soule*, 4 Russ. 112.

MOORE v. PRIOR.

Dec. 7th.

WILLIAM PHELPS, deceased, by his will bequeathed various legacies and devised various real estates, and by a codicil he bequeathed an annuity of 30*l.* to Sarah Prophett for her life, which was afterwards, in November 1835, assigned for valuable consideration to the plaintiff. William Phelps having, after the date of his will, contracted for the purchase of certain real estates, and having died without completing that purchase, a suit was instituted

Where a decree had been pronounced in the Court of Chancery for the general administration of a testator's assets, a bill filed in this Court by an annuitant under the will against the executors

was dismissed, although the decree in Chancery was not drawn up.

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in the Court of Chancery (*a*) by his heir-at-law, to whom those estates had descended, for the purpose of charging the testator's personal estate with the purchase-money for the descended estates remaining unpaid. This suit was followed by several others in the same Court relative to the affairs of the testator. Amongst them was a suit instituted in May, 1835, by Anthony Sproule, the personal representative of one of the legatees, on behalf of himself and the other unsatisfied legatees, against the real and personal representatives of the testator, praying the payment of the legacies, and particularly a legacy of 1,000*l.* due to the plaintiff; and in case the testator's personal estate should be exhausted by payment of the purchase-money for the descended estates, then that the legacies might be raised and paid out of the descended estates (*b*). The last-mentioned suit, which was the suit of "*Sproule v. Prior*," together with the other suits, came on for hearing before the Vice-Chancellor on the 2nd November, 1836, when it was decreed, in all the suits, that it should be referred to the Master to take the usual accounts of the testator's personal estate, and also of the testator's debts, funeral, and testamentary expenses, and of the legacies, and the annuity given and bequeathed by his will and codicil.

At the time this decree was pronounced the present suit was pending in this Court. The bill had been filed in January, 1836, against the same persons as were defendants in "*Sproule v. Prior*," praying payment of the annuity, and for that purpose seeking the same relief against the personal and descended real estates of the testator as had been sought in the case of "*Sproule v. Prior*." The same solicitor acted for the plaintiff in each cause.

A motion was now made on behalf of all the defendants (except one who had ceased to have an interest), that all

(*a*) See *Phelps v. Sproule*, 1 M. & K. 231.

(*b*) See *Polluxfen v. Moore*, 3 Atk. 272.

further proceedings in this suit might be stayed. In support of the motion an affidavit was read, stating that immediately after the decree in Chancery was pronounced, notice of that fact, and of the purport of the decree, was served on the solicitor of the plaintiffs in this suit; that the decree was then in the course of being drawn up, and would be perfected and prosecuted with all due diligence; that by virtue thereof the testator's estate and effects would be administered among the creditors and legatees; that the plaintiff would be at liberty to make out his claim before the Master to whom the causes in Chancery stood referred; that consequently the present suit was unnecessary, and if proceeded in would be stayed, together with all further allowance of costs. The affidavit then stated that, notwithstanding this notice, the plaintiff had proceeded with the present suit.

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Mr. *Simpkinson* and Mr. *Bethell* for the motion.—*Hayward v. Constable* (a), is an authority to shew that the Court will stay these proceedings. The nature of the proceedings in the Court of Chancery was to bring to it the whole administration of the personal estate in which this plaintiff is interested. It has therefore possessed itself of that. A question was raised in the cause of "*Sproule v. Prior*," as to the right of the annuitants to have their claims satisfied in priority to the claim of the heir at law; and that was decided in their favour. The decree in Chancery is a perfect decree, declaring the whole of the equities of the annuitants and the legatees of Phelps. Nothing can be said in answer to this fact, except that the decree has not been actually drawn up; but it is in the progress of being drawn up, and is only delayed by the conduct of this plaintiff. It is remarkable that the attorney who acts for the plaintiff in this suit, was the

(a) Ante, p. 43.

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attorney in the cause of "*Sproule v. Prior*," and that both bills are signed by the same counsel, and are, *mutatis mutandis*, the same. There being, therefore, an identity of purpose in these suits, it would be a useless waste of the testator's assets to permit the suit in this Court to continue. Even if the plaintiff obtained a decree here, he must go into Chancery to participate in the fund.

Mr. *Temple* and Mr. *Kenyon Parker*, *contra*.—No decree has been yet drawn up in Chancery. It would be a novelty for the Court to say to a suitor, You shall go no farther in your proceedings here, because it is averred that there will be a decree in another Court, under which you may have relief. The Court only acts on the inspection of the decree itself, from which alone it judges whether there is any need of further proceedings in this Court. In *Hayward v. Constable* it was manifest that the two suits were for the same purpose. Here, that is by no means evident. It is, in fact, not known what the decree will be; and the Court cannot act upon a mere affidavit as to the general result of the decree. In *Jackson v. Leaf* (a), Lord *Eldon* said that he did not remember any instance where one Court had enjoined a party from proceeding in another Court of equity, though he stated that in the same Court an injunction would lie where there were different suits for the same purpose. Now, even admitting that the present suit is instituted for the same purpose as the suit in Chancery, that circumstance alone ought not to induce this Court to stay these proceedings. "*Sproule v. Prior*" is the first case in which *Pollexfen v. Moore* (b), was overruled. Upon the hearing of this case, your Lordship may be of a different opinion upon the point of law.

Mr. *Simpkinson* in reply.

(a) J. & W. 232.

(b) 3 Atk. 272.

The LORD CHIEF BARON.—It appears to me that no purpose will be gained by this suit, and that there is no reason why the plaintiff should not obtain the relief which he seeks in the Court of Chancery, where the account will be taken of all the legacies and personal estate of the testator. Let the proceedings be stayed till the further order of the Court, but let the question of costs be reserved.

Order accordingly.

SELBY v. GILLUM.

Dec. 13th,
15th.

STEPHEN FRYER GILLUM, by his will, after devising certain estates in Essex, in aid of his personalty, for the payment of his debts, gave and devised his estates in Northumberland to trustees, of whom the plaintiff was the representative of the survivor, upon trust for securing certain annuities; and subject thereto, (and also charged and chargeable with the sum of 6,000*l.* as a provision for his eldest daughter Anne Gillum, to be raised and paid as thereafter mentioned, and with the further sum of 16,000*l.* by way of provision for his younger children, Elizabeth, Margaret, Marianne, Henry George, Isabella Selby, and Charlotte Sarah, to be raised and paid in such proportions, at such times, and with such interest for the same, or with such monies in lieu of interest for the same, in the meantime, as thereafter mentioned), to the use of his son, Stephen Fryer, in case he should live to attain the age of twenty-one years, and to his heirs and assigns for ever. The testator then proceeded as follows:—"And as for and concerning the said sum of 6,000*l.* hereinbefore mentioned and intended by me as a provision for my said eldest daughter, and which I do hereby charge upon my said estates hereinbefore devised to the use of my son Stephen

Portions held to be raisable before the time of payment, under the particular construction of the will by which they were given.

Where a testator made special provision for the maintenance of his younger children until receipt of their portions, and stated the sum appointed for the maintenance of the sons to be "in lieu of interest:"—*Held*, that the daughters were not entitled to interest on their portions, although there was a general clause in the will that the trustees should stand possessed of the trust funds, and the interest, divi-

dends, and annual produce thereof, for the benefit of the daughters, upon their attaining 21.

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Fryer as aforesaid, my will is, and I do hereby direct that the same shall be raised by sale or mortgage of a competent part of the said hereditaments and premises charged therewith, within the space of two years next after my said son Stephen Fryer shall have attained the age of twenty-one years; or in case he shall die under that age, then within two years after his decease; and the same, immediately after it shall be raised, shall be paid to my said daughter Anne; and in the meantime, until the same shall be raised and paid, the annual sum of 300*l.*, as and by way of interest for the said sum of 6,000*l.*, shall be paid to my said daughter by equal half-yearly payments on the 12th day of May and the 11th day of November in every year, from and after my decease, out of the rents and profits of the said hereditaments and premises, until the said principal sum shall be raised and paid, &c. And as for and concerning the said sum of 16,000*l.* hereinbefore mentioned and intended by me as a provision for my younger son and younger daughters, and which I do hereby also charge upon my said estates devised to the use of my son Stephen Fryer Gillum, my will is, and I do hereby direct, that the sum of 5,000*l.*, part of the said sum of 16,000*l.*, shall be raised by mortgage or sale of a sufficient part of my estates and hereditaments charged therewith, and paid to my son Henry George, immediately upon his attaining the age of twenty-one years; and that in the meantime, and in lieu of interest for the same, the following sums of money shall be paid to my said trustees, to be applied in and for the maintenance and education of my said son Henry George, that is to say, the annual sum of 100*l.* when he shall be under ten years of age, the annual sum of 150*l.* while he shall be above ten and under fifteen years of age, and the annual sum of 200*l.* while he shall be above fifteen and under twenty-one years of age. Provided always, that in case my said son Henry George shall depart this life before he shall attain the said age of

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twenty-one years, then and in that case the said sum of 5,000*l.* intended for him, and being part of the said sum of 16,000*l.*, shall not be raised or paid, but the hereditaments charged therewith shall thenceforth be freed and exonerated from the said sum of 5,000*l.* And I will and direct that the said sum of 11,000*l.*, residue of the said sum of 16,000*l.*, shall be raised in like manner as aforesaid within the space of two years next after my said son Stephen Fryer shall have attained his age of twenty-one years, or in case he shall die under that age, then within two years after his decease; and when and so soon as the same shall be raised and paid, the sum of 2,200*l.*, being one equal fifth part or share, shall be paid to my said daughter Elizabeth, to and for her own use and benefit, in case she shall then have attained the age of twenty-one years; and if not, then upon her attaining the said age; and in the meantime the same shall be invested by my executors and trustees for her benefit in the manner herein-after mentioned. And as for and concerning the remaining four fifth parts of the said sum of 11,000*l.*, the same shall be laid out and invested by my said executors and trustees, in their names, &c. in some of the public stocks or funds of this kingdom; and they my said executors and trustees, &c. shall stand and be possessed of and interested in the stocks, funds, and securities so to be purchased, and of and in the dividends, interest, and annual produce thereof, upon the trusts following; that is to say, in trust for my said daughters Margaret, Marianne, Isabella Selby, and Charlotte Sarah, and to be equally divided between them, share and share alike, the same shares to be interests vested in them my said daughters respectively at their respective ages of twenty-one years. Provided always, that if any one of my said daughters, Elizabeth, Margaret, Marianne, Isabella Selby, and Charlotte Sarah shall depart this life under the said age of twenty-one years, then the part or share of such daughter so dying

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under the said age of twenty-one years shall be upon trust for the survivor of them my said daughters, and shall be equally divided between them, share and share alike; but in case any two of them my said daughters Elizabeth, Margaret, Marianne, Isabella Selby, and Charlotte Sarah shall depart this life under the said age of twenty-one years, then the sum of 6,600*l.*, part of the said sum of 11,000*l.*, shall be paid to the survivors of them my said daughters, and the sum of 4,400*l.*, residue thereof, shall be paid to and divided between my said daughter Ann, and my son Henry George, on their severally attaining the age of twenty-one years, in equal shares and proportions." [The will then contained provisions in the event of the deaths of others of the children.] " Provided always, that it shall be lawful for my said executors and trustees, &c., from time to time during the minority of my said son Stephen Fryer to apply for the maintenance and education of him my said son such sum or sums of money out of the rents and profits of the hereditaments and premises so devised to him as aforesaid as they shall think proper, not exceeding the following sums of money; (that is to say), the annual sum of 100*l.* while he shall be under ten years of age, the annual sum of 150*l.* while he shall be above ten and under fifteen years of age, and the annual sum of 250*l.* while he shall be above fifteen and under twenty-one years of age; and that during the respective minorities of my said daughters (except my eldest daughter, Ann, whose maintenance is hereinbefore provided for), to apply such sum or sums of money as they my said trustees or trustee for the time being shall think proper, not exceeding the annual sum of 100*l.* for each such child whilst under ten years of age, the annual sum of 125*l.* for each such child whilst above ten and under fifteen years of age, and the annual sum of 150*l.* for each such child whilst above fifteen and under twenty-one years of age, from and out of the rents and profits of the said hereditaments and premises charged with the provi-

sions made for them my said daughters by this my will, in, for, and towards the maintenance and education of such daughters respectively as aforesaid." The testator then, after giving his trustees power to lease, and other powers relative to his real estates, and after bequeathing several legacies and annuities, bequeathed the residue of his personal estate to his trustees, their executors, &c., upon trust to invest the same in the public funds, and to stand possessed of the dividends thereof in aid of his real estate, in satisfaction of the several charges thereon; and subject thereto, in trust for all his children by name, (except his eldest son), equally to be divided amongst them, share and share alike, and to be paid to them at their respective ages of twenty-one years, with benefit of survivorship in case of the death of any under twenty-one.

The testator, by a codicil to his will, after reciting that he had charged his Northumberland estate with the sum of 16,000*l.*, for the benefit of his younger children, and that he had then three more children since the making of his will, viz., Georgiana, Catherine, and Prideaux William, charged the same estates with the additional sum of 6,000*l.* for the benefit of the younger children. He then directed that his son Henry George should, out of the 22,000*l.* so constituted, receive the sum of 4,000*l.* only, to be paid to him at twenty-one, instead of the 5,000*l.* provided by the will; but that the annual provision for his maintenance should remain the same as before. The testator then directed a sum of 4,000*l.* to be raised in like manner for his son Prideaux William, to be paid him at twenty-one; that until that time, in lieu of interest, the same sums should be applied for his maintenance as had been provided for that of Henry George; and that, in the event of his dying under twenty-one, his share should not be raised. The testator then proceeded as follows:—"And whereas by my said will I have given to each of my said daughters Elizabeth, Margaret, Marianne, Isabella Selby,

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and Charlotte Sarah, the sum of 2,200*l.*; now my will is, that each of my said daughters shall be entitled to receive the sum of 2,000*l.* only, in lieu of the said 2,200*l.*, such respective sums of 2,000*l.* to be raised in the same manner, and to vest in and be payable to my said daughters respectively at the time and in such manner as in my said will is directed concerning the said sum of 2,200*l.* thereby given to them respectively as aforesaid; and I do will and direct that the like sum of 2,000*l.*, part of the same charged upon my estates as aforesaid, shall be held by my said trustees, in trust for each of my said daughters, Georgiana and Catherine, to be an interest vested in them my said daughters respectively, at their respective ages of twenty-one years: Provided always, that in case one of my said daughters, Elizabeth, Margaret, Marianne, Isabella Selby, Charlotte Sarah, Georgiana, or Catherine shall depart this life under the age of twenty-one years, then the part or share of such daughter dying under the said age shall be in trust for the survivors of them my said daughters, equally to be divided between them; but in case any two of them, my said daughters, shall depart this life under the age of twenty-one years, then, instead of the directions contained in my said will with regard to the happening of such an event, I do will and direct that the sum of 12,000*l.*, part of the sum of 14,000*l.* hereby intended for their benefit, shall be paid to the survivors of them my said daughters, and the sum of 2,000*l.*, residue thereof, shall be paid to and divided between my daughter Anne, and my sons Henry George and Prideaux William, on their severally attaining the age of twenty-one years, in equal shares and proportions." The testator then made provision for the event of other children dying under twenty-one.

The testator died in October, 1826, leaving the several children named in the will and codicil surviving him. Three of these, however, died under the age of twenty-

one, namely, Henry George, Georgiana, and Catherine. Of the others, Anne attained her majority in the lifetime of the testator, and married the defendant Steele; and Stephen Fryer attained his majority in October, 1833, and Elizabeth and Margaret in the years 1832 and 1834.

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The questions in the cause were—

1. Whether, inasmuch as two years had elapsed since Stephen Fryer Gillum had attained his age of twenty-one years, all the younger children, or such only as had attained twenty-one, were entitled to have their portions raised and invested for their benefit; and whether such as were so entitled had a right to interest on their portions, as well as specific sums for their maintenance during their minority?

2. Whether the share of Henry George Gillum in the sum of 2,000*l.*, which was provided by the codicil for Anne, Henry George, and Prideaux William, in the event of two of the younger daughters dying under twenty-one, merged in the estate upon the death of Henry George under twenty-one?

3. Whether, if it did not merge, it survived to Anne and Prideaux William, or descended to the personal representative of Henry George?

Mr. James Russell, for the plaintiff.

Mr. Bethell, for the personal representative to Henry George Gillum.—By the terms of the will, Henry George Gillum, dying under twenty-one, was not entitled to the sum of 5,000*l.* thereby provided for him, because in the will is an express provision against his taking a vested interest during his minority. But the 4,000*l.* provided for him by the codicil was a vested interest in him before twenty-one, and as such is transmissible to his personal representative. If the testator had intended otherwise, he would have repeated in the codicil the direction, which he had

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before given in the will, that the share of Henry George should merge upon his death under twenty-one. But that the testator has omitted to do, although in the same codicil he does give such a direction in regard to the share of Prideaux William. That being the apparent intention of the testator in regard to the 4,000*l.*, it is reasonable to suppose that he likewise intended Henry George to take a vested interest in the one-third of the 2,000*l.* bequeathed to him in the event of the death of two of his younger sisters. That one-third he took as tenant in common, and consequently it has descended to his representative.

Mr. Hayter, for the defendants, *Mr. and Mrs. Steele*, contended that the share of Henry George in the 2,000*l.* survived to *Mrs. Steele* and *Prideaux William*, and that the testator had throughout his will avoided the use of words creating a tenancy in common; he had, on the contrary, taken pains to make express provision for the case of every individual daughter dying.

Mr. G. Richards, for the younger daughters of the testator.—The general principle is admitted, that where portions are charged by will on real estate, the time of raising is the time of payment. But here the testator appoints a time of raising these portions independently of the time of their payment, namely, within two years after his son, *Stephen Fryer Gillum*, should attain twenty-one years of age. The portions, therefore, are raisable at that period, whether the daughters are of age or not; the time of raising them being fixed by the instrument by which they are created: *Codrington v. Lord Foley* (a). The money must be raised and invested immediately, and paid to the daughters at their respective ages of twenty-one. They are likewise entitled to certain specific sums for mainte-

(a) 6 Ves. 364, 379.

nance out of the rents of the real estate, and to interest on their portions. There is an express direction in the will that the trustees shall stand possessed of the funds to be purchased for the younger daughters, and of the dividends, interest, and annual produce thereof, in trust for their benefit. He then referred to *Courtney v. Ferrers (a)*.

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Mr. Russell, in reply.

ALDERSON, B.—On examining the will and codicil carefully, which are very incorrectly worded, the case does not appear to present much difficulty. It seems clear that the testator intended to give specific legacies of money to his children, as charges on his real estate, on their attaining twenty-one, and to give to all, except his daughter Anne, maintenance till that period.

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In the legacies to the sons, he speaks of this maintenance being in "lieu of interest." There the interest would have exceeded the sum for maintenance, and that clearly shews his intention that only maintenance should be there given, *negating* interest.

In the case of the daughters, whose specific portions were smaller, he gives maintenance expressly, but says nothing about interest; probably because the amount was less than the maintenance.

These circumstances would lead me to conclude, as to his intention, that he did not mean to give interest. The only passage in the will to the contrary, is that referred to by Mr. Richards, in which the testator directs the trustees, after raising the remaining 4-5ths of the 11,000*l.*, to stand possessed of the interest and dividends, in trust to divide it equally amongst the four daughters. But all the rest of the will and the codicil is wholly inconsistent with this clause if taken literally. Throughout, he speaks

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of the legacies to his daughters as specific sums of money payable at twenty-one. On the whole, I do not doubt that only maintenance is due.

Secondly, I think it quite clear that, taking the will and codicil together, as they ought to be taken, the testator has clearly expressed his intention, that in case Henry George did not attain twenty-one, his legacy should merge. All the legacies are postponed as to the time of payment, in consequence of the minority of the legatees, and a separate provision during minority is made for them. This clearly brings the case within the general rule of legacies charged on land, and not within any of the exceptions.

Thirdly, I think, that in the events which have happened, namely, the deaths of two of the daughters under twenty-one, and that of Henry George Gillum before those deaths both happened, Anne and Prideaux only take one-third. I think the intention of the testator was to give the 2,000*l.* to them, not as survivors of Henry George Gillum, but in specific thirds.

And as to the one-third which would have gone to Henry George Gillum if he had survived, I think that his personal representative has no claim to it. If transmissible at all, its payment depends at all events on his attaining twenty-one, and he not having done so, it sinks into the estate.

I think, therefore, that I must, on the whole will,

Declare, that on attaining twenty-one, in the events which have happened, each of the surviving daughters will be entitled to one-fifth of 12,000*l.*, and that Prideaux William Gillum is entitled to 4,000*l.*, and also to a one-third share of 2,000*l.*, in consequence of the contingency of the deaths of his two sisters and brother Henry George Gillum; that Ann is entitled, in addition to her 6,000*l.*, to one-third of 2,000*l.* also, under the same contin-

gency; that the legacy to Henry George Gillum has merged, and also the contingency of one-third of 2,000*l.*, and that his personal representative is not entitled to anything; that the 12,000*l.*, and the share of Ann, 666*l.* 13*s.* 4*d.*, is raisable now, and that the share of P. S. Gillum will be raisable on his attaining twenty-one; that the younger children are entitled to maintenance till twenty-one, at the rates specified, and not to interest on their portions.

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Dec. 8*th*.

THE bill, which was filed by underwriters against an assured, who had brought actions against the plaintiffs on the policies, prayed for discovery, and a commission to examine witnesses abroad in aid of the plaintiffs' defence to the actions, and that in the mean time the defendant might be restrained from proceeding in the said actions, and from commencing any other action against the plaintiffs.

A demurrer in bar of relief, without mentioning discovery, where the bill merely prays discovery, is bad.

A bill for a commission to examine witnesses abroad, in aid of a defence to an action at law, is not a bill for relief.

The defendant demurred to the bill, alleging, as cause of demurrer, "that it appears by the said complainants' own shewing in their said bill, that they are not entitled to demand any such relief thereby against this defendant as is prayed by their said bill: wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and humbly asks the judgment of this Honorable Court whether," &c.

Mr. *Spence*, for the defendant, having stated the nature of the bill and demurrer,

Mr. *G. Richards*, for the plaintiff, objected that the demurrer being to relief only, and not to discovery and relief, could not be supported. Had the bill prayed relief, the demurrer to the relief would have included the discovery;

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but the bill not praying relief, the defendants ought to have demurred specifically to the discovery. The defendant could not be allowed to demur *ore tenus* to the discovery, for then his objection would be inconsistent with his demurrer, as it appeared on the files of the Court.

The LORD CHIEF BARON being extremely unwilling to entertain this objection,

Mr. *Simpkinson*, *amicus curiæ*, said, that Lord *Lyndhurst* had laid it down, that you cannot, on a bill for mere discovery, demur to the relief, and *ore tenus* demur to the discovery; you must confine yourself to what is covered by the demurrer on the record.

Mr. *Spence* and Mr. *Purvis*, for the defendant.—In *Crow v. Tyrrell* (a) it was held that asking for the production of papers and documents is asking for relief, but no such decision has ever been made in regard to a commission to examine witnesses abroad. It is submitted, therefore, that this is a bill for relief. But even if it be not, we submit that a demurrer to the relief extends to every thing contained in the bill, whether it be for relief, or simply for discovery, *Wallis v. Duke of Portland* (b), *Lord Kensington v. Mansell* (c), *Wigram on Discovery*, p. 150. Even admitting that the first part of the demurrer is bad, it will be saved by the words, “for divers other good causes,” &c.

Mr. *Richards* in reply observed, that in the cases cited on the other side the form of the demurrer did not appear. He also contended that praying for a commission to examine witnesses in aid of a defence at law, could

(a) 2 Mad. 408.

(b) 3 Ves. 491.

(c) 13 Ves. 240.

not turn the bill into a bill for relief: *Chimell v. Chauvet* (a).

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The LORD CHIEF BARON said, that he was sorry to decide against the defendant on a question of form, but that there would be no distinction between one demurrer and another, if he did not say that this was a demurrer to relief which was not sought by the bill. He should, however, give the defendant liberty to amend his demurrer, upon payment of costs, and undertaking not to proceed in the actions till the demurrer should have been argued.

Order accordingly.

Dec. 19th.

The amended demurrer now came on for argument.—The bill purported to be brought by certain persons therein named, described as of Lloyd's Coffee-house, in the city of London, merchants and underwriters, and also by the corporation of the London Assurance. It stated that on the 7th of August, 1835, George Robinson & Co., as well in their own names as in the names of all other persons to whom the same might appertain, effected two policies of insurance, one whereof was underwritten by the Lloyd's underwriters, and the other by the London Assurance, upon the ship *Clio*, bound from Liverpool to Para in the Brazils, and upon certain arms, accoutrements, musical instruments, and other goods on board the said ship. That the said ship sailed from Liverpool on the said 7th August, having, as it was alleged, the said goods on board, and proceeded on her voyage until the 30th September, when, as was alleged, she anchored off a place called Se-

Where a bill for discovery against an assured alleged that he had been employed to procure the goods which were the subject of the policy:—*Held*, that a demurrer to the discovery would not hold, although the bill stated that the defendant had been paid and satisfied the full value of the goods; the object of the bill being to ascertain whether he was not a mere agent.

A bill brought by the Lloyd's underwriters

and the Corporation of the London Assurance in respect of policies underwritten by each of those parties respectively, is not multifarious; although the Lloyd's policies are not under seal, and those of the London Assurance are under seal.

Since the *Reg. Gen. Hil. Term*, 4 Will. 4, a defendant in an action of *assumpsit* brought on a policy of insurance, must plead the plaintiff's want of interest specially.

(a) 1 Younge, 304.

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linas, in South America, which was in her course to Para. That by certain papers which had been produced by the defendant to the plaintiffs in support of his claim on the policies, it was alleged, that, on the 3rd of October, 1835, the ship was attacked and destroyed by pirates, and the goods so insured were stolen and taken away, and became wholly lost to the defendant. That the plaintiffs had lately, and since the said pretended loss, discovered that the goods mentioned in the policies were ordered by the defendant, in order that he might supply the Brazilian government therewith, and that the Brazilian government had employed the defendant to ship the said goods on board the said ship, for the purpose of being brought from Liverpool to Para, and that the said shipment was made by the defendant in consequence of a contract that had been made with the Brazilian government, that he would procure the said goods, to be shipped and conveyed to Para, for the benefit of the said government. That amongst the papers produced by the defendant there was a copy of a letter, dated Para, 27th September, 1834, written and sent by the defendant to Messrs. Bates & Barrows, of Birmingham, ordering the goods comprised in the policies. [The bill then set forth the letter, in which the defendant stated that he had contracted with the Brazilian government to furnish them with the accoutrements, and requested his correspondents to execute the order.] The bill then stated and charged as follows: "That since the loss of the said ship, your orators have ascertained, as the fact and truth is, that the said Brazilian government have paid the said defendant hereto for the said goods, and for each and every of them, and for all the costs which he has been put to in relation thereto, and that in fact there is now nothing due and owing to the said defendant in respect of the said goods, the said government having satisfied the said defendant every thing in respect thereof. And your orators further shew,

that the defendant has nevertheless commenced actions, &c. And the said defendant sometimes pretends, that the said Brazilian government have not paid him for the said goods, whereas your orators charge the contrary to be true, and that previously to the shipment of the said goods, the said Brazilian government entered into a contract in writing with the said defendant, relating to the said goods; and so it would appear, if the said defendant would set forth a full, true, and particular account of each and every contract which he has entered into with the said Brazilian government, relating to the said goods and every part thereof, and when and where such contract was entered into, and the particulars thereof. And your orators charge, that the said defendant, at the time that the said contract was entered into with the said Brazilian government, received a very considerable sum of money in respect of the said goods, and has from time to time, since the said contract, received large sums of money in respect of the said goods, and so it would appear if the said defendant would set forth a full, true, and particular account of all and singular the sums of money received by the said defendant from the said Brazilian government, in respect of the said goods; and the defendant sometimes pretends that the said goods form an item in account between himself and the said Brazilian government, whereas your orators charge the contrary to be true, and that in such account the said Brazilian government have given credit to the said defendant for the said goods, and so it would appear if the said defendant would set forth, as he ought to do, a full, true, and particular account of the dealings and transactions between himself and the said government, of and relating to the matters aforesaid; and whether there is not a large sum of money now due and owing by him to the said government upon a balance of account."

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Mr. *Spence* and Mr. *Purvis*, for the demurrer.—The allegations in the bill as to the defendant having been paid by the Brazilian government, are perfectly inconsistent with each other. First, the bill states that the defendant has been paid in monies numbered, and then that the Brazilian government has given the defendant credit for the goods in account. Such a mode of pleading is inadmissible. Besides, it is not stated in the bill when the defendant was paid, and he may have been paid subsequent to the actions. Let it be conceded, however, that he has been paid to the full extent stated in the bill. For what purpose is the discovery sought? If the Brazilian government have paid him upon a consideration that has altogether failed, they may recover the money in an action against the defendant. That, however, is not a matter in which the plaintiffs are interested, and could afford them no defence to the actions brought by the defendant against them. The discovery therefore which they seek in aid of what, if proved, would be no defence at law, cannot be granted, and upon that ground the demurrer ought to be allowed: *Mendisabel v. Machado (a)*, *Robertson v. Lubbock (b)*.

The other objection to the bill is on the ground of multifariousness. The bill is brought, in respect of two distinct policies, by two distinct parties, one of whom, being a corporation, have affixed their seal to the policy in which they are concerned. It follows that the actions which have been brought against these parties are distinct in their nature, and must be met by different pleas. How, then, can one injunction be granted to restrain the defendant in both actions? If this mode of pleading be allowed, the commission and injunction must go in the name of all the plaintiffs, although some of them may not have an interest, or not a joint interest with the others, in

(a) 1 Sim. 68.

(b) 4 Sim. 161.

the discovery, which is contrary to the known rule upon the subject: *Mif. Pl.* 187, 4th ed.

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Mr. *Simpkinson* and Mr. *G. Richards*, for the bill.—If it appeared clear upon the face of the bill that the defendant, as seller, had agreed to furnish these goods to the Brazilian government, and had been paid for them, no doubt he would be liable to refund the money to the buyers, and in that case the present plaintiffs might fail in their defence at law. But that is not the case made by the bill. The bill states that the defendant has been paid, but inquires under what circumstances. Now if the plaintiffs are entitled to an answer to any part of the bill, the demurrer going to the whole discovery must be overruled. It is stated that Campbell entered into a contract with the Brazilian government, and one part of the bill calls on him to set forth the terms of the contract. In the action which he has brought he has averred the interest to be in himself, but the contract, if discovered, would shew what real interest he had; and it is to defend the actions in this particular that we call upon him for discovery. If it appear that he had no interest, and was fully satisfied, it is clear that he must be restrained in these actions: *Godsall v. Boldero* (a). If he has been satisfied his demand, it is new for a party to bring an action, and then demur to the discovery in aid of the defence. The discovery sought is not in aid of an action, but in aid of a defence to an action; and therefore, if this demurrer be not overruled, a judge in equity will have to decide whether certain facts do or do not constitute a good defence at law; which is contrary to the functions of such a judge: *Bishop of London v. Fytche* (b). But it is not necessary to dwell upon this: the real question is, whether, considering that a policy of assurance is merely a contract of indemnity, this defen-

(a) 9 East, 72.

(b) 1 Bro. C. C. 96.

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dant, who admits by his demurrer that he has been fully paid and satisfied, shall be allowed to continue these actions. Some of the charges of the bill may not be so strong as others; but it is enough to say that there is a charge, that he has been paid for the goods and for all costs incurred, and that there is nothing due and owing to him in respect of the goods.

The other objection to the bill is untenable. It is every day's practice for underwriters to join in one suit in respect of different policies: *Kensington v. White* (a), *Irving v. Vianna* (b), *Janson v. Solarie* (c). [Mr. Purvis.—In those cases the policies were underwritten by all the plaintiffs]. In *Shackell v. Macaulay* (d), Sir John Leach said that underwriting causes were not to be reasoned upon as affording general rules in matters of pleading; and it is clear that it would be highly inconvenient to require a separate bill for every policy. [The Lord Chief Baron.—If I remember right, the frame of the bill in *Shackell v. Macaulay* was something like the present, but there the commissions were to be directed to two different places, so that the evidence taken under them might come back at different times.] That circumstance made the objection for multifariousness much stronger in that case than in the present. But at all events the defendant is too late in this objection. After permission to amend he could not put in a demurrer for multifariousness, and therefore he cannot be permitted to make the same objection *ore tenus*.

Mr. Spence, in reply.

THE LORD CHIEF BARON.—As to the objection for multifariousness, it appears to me that there is no distinc-

(a) 3 Price, 164.

(b) M'Clel. 563.

(c) Ante, p. 127.

(d) 2 Sim. & Stu. 87.

tion in principle between this case and those which have been cited, where the underwriters having been sued upon different policies, the Court has not put them to file different bills to restrain the actions. The circumstance that one of the policies in this case is under seal, and the other not under seal, can make no difference. Formerly the only difference would have been, that in the actions on the policies the corporation of the London Assurance might have pleaded specially that the plaintiff had no interest, while the others would have given that fact in evidence under the general issue. But the late act ^(a) renders it necessary for underwriters, even in *assumpsit*, to plead specially in matters of this nature. Therefore, in fact, the two actions would be met by the same sort of plea. Upon these grounds it appears to me that the first objection fails.

Upon the other point, I own that I at first entertained some doubts; but I think I shall come to a just conclusion if upon that also I overrule this demurrer. If Mr. *Spence's* mode of construing this bill were correct throughout, the observation would apply, that credit having been given to the defendant upon a consideration which had failed, the money must be refunded; and in that view of the case it would appear upon the bill, that he had no interest in the policy. But I am not called upon to confine myself to that view of the case. When a party demurs, his demurrer ought to embrace all that was reasonably intended by the bill. Undoubtedly the bill might have been better framed. The intention was to see whether Campbell was not a mere agent of the Brazilian Government. One part of the bill states that he has been paid, and as to that there are sufficient allegations; for what does it signify whether the other part of the bill is not so strong? Then, in what character was he paid?

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(a) 3 & 4 Will. 4, c. 42; Reg. Gen. H. T. 4 Will. 4.

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The bill suggests, as an agent. It says that he was employed "to procure the goods," not to sell them. If he was employed to procure them, he is like any other agent; and if paid, he can have no right to maintain the action. If, on the other hand, he was the seller, he is bound by his contract with the Brazilian Government in case he does not deliver the goods; and in that case, I admit that if he was paid he must refund. The question then turns upon whether he was seller or agent, and as to that the plaintiffs are entitled to discovery. The demurrer, therefore, must be overruled.

Demurrer overruled.

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Nov. 17th.

Upon the coming in of the defendant's answer, in an insurance cause, the Court refused to allow the plaintiffs to amend their bill by adding charges relative to matters which might, with proper diligence, have been originally put in issue by the plaintiff.

The defendant then put in his answer, in which he set forth *verbatim* an agreement between himself and the Brazilian government, dated the 24th of September, 1834, by which it was stipulated that the defendant, who was residing at Para, should send for the arms and accoutrements to England; that they were to be provided according to certain patterns, and to be shipped on account of the contractor, and conveyed as far as Para, and then delivered to the agents of the Brazilian government; and that half the purchase money was to be paid to the defendant before the delivery, and the remainder upon delivery. The defendant then stated, that in pursuance of this agreement he ordered the goods in question, and on the 20th of February, 1835, received from the Brazilian government one-half of the amount; but that he gave security to that government for the due performance of the contract, and held himself liable to them in case it was not performed. He admitted the capture and loss. He insisted that the arms having been shipped on his own account, and himself being liable to the Brazilian government for the moiety of the purchase money which he had been paid antecedently to the loss, he ought not to be restrained in the actions. He admitted, however, that he had not repaid the moiety of the purchase money, but that the

Brazilian government, having taken the circumstances into consideration, had given him time to fulfil his engagement, and that he had in consequence written to Messrs. Bates & Barrows for a further supply of arms.

A motion was now made, on behalf of the plaintiffs, for liberty to amend their bill, without prejudice to the injunction, by adding certain charges and inquiries as to whether any contract had been entered into by the defendant and the Brazilian government for giving time for the fulfilment of his engagement; what were the particulars of the correspondence with Bates & Barrows for the further supply of arms; and lastly, whether any of the arms which had been supplied, and were alleged to be lost, had not got into the hands of the Brazilian government.

Mr. *Simpkinson* and Mr. *G. Richards*, for the motion.— This is the first time that the plaintiffs have had any information of the defendant's having had time given to fulfil his contract, and of his having ordered a further supply of arms. It becomes, therefore, essential to know the particulars of the new agreement and new order. The first contract that was entered into was in writing, and is given by the defendant *verbatim*. The probability is, that the second was in writing also. It may contain recitals materially affecting the plaintiffs; shewing, for instance, either great laches on the part of the Brazilian government, or that they had got possession of the arms before the pirates seized the ship; or it may shew, what seems probable from some expressions in the answer, that the ship had arrived at the limits within which the goods were to be delivered; in which case the defendant's liability to the Brazilian government would cease. *Janson v. Solarie (a)* is an authority for this application.

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(a) Ante, p. 132.

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Mr. *Spence* and Mr. *Purvis*, *contrà*.—In *Janson v. Solarte*, the motion was supported by affidavits as to matters which were in immediate connection with the subject of the bill. Here, the plaintiffs have filed no affidavits, but rely entirely upon their own suggestions derived from the answer. At all events, they ought to shew that the defendant has disclosed matters which are material to their case, and which they could not have known before. The goods insured, and in respect of which the bill was brought, were those mentioned in the contract which is set forth in the answer. Prior to their delivery, those goods were lost, and the defendant having come upon the underwriters for the insurance money, they filed the present bill to ascertain what interest he had in them. Now, whatever that interest was, it can have no reference to any subsequent contract made in relation to other goods; but, even looking at the defendant's actual interest in the goods that were lost, is it probable that the information sought would be material to the plaintiffs? He undertook to furnish goods to the Brazilian government. They were lost, and the defendant having been paid for them became liable to refund. The government, however, instead of calling on him or his sureties to repay, agreed that he should furnish other goods to supply the loss. How can anything arise out of this that would be material to the plaintiffs? But we submit that they should at least have filed affidavits as to materiality.

Mr. *Simpkinson*, in reply.

The LORD CHIEF BARON.—The only doubt which I have entertained in this case is, whether or not there was a sufficient disclosure of the circumstances, before any bill was filed, to lead the plaintiffs to suggest by their bill whether any and what arrangement had been made at any time between the defendant and the Brazilian go-

vernment in respect to this loss. I admit that, in general, if you direct your inquiries to a particular contract made at one particular time, and the defendant discloses some other contract made at another time, which is connected with the matters inquired after, but does not amount to a full disclosure of those matters, this would be ground for allowing you to amend your bill. But where the disclosures already made before the filing of the bill are sufficient to put the plaintiff on inquiry, as the disclosures here were sufficient to put the plaintiffs on their inquiry as to the probability of loss, and the nature of the contracts entered into—I am at a loss to see why the original bill should not have been directed to those subjects. I think there is much in what was said for the plaintiffs as to the first contract being set out in the answer, and the other not: but still I think the plaintiffs come too late to avail themselves of any inquiries which might arise from this circumstance. The underwriters in this case were aware, when they filed their bill, that the ship had been lost, that the cargo was said to have been taken by pirates, that the party who had ordered the cargo had been in some way paid, and yet that he was seeking to recover the insurance money in an action. Upon the supposition that he had been paid, they make certain inquiries on that head, to which he answers that he has been paid half the amount. They then find their case incomplete without further information as to how and under what conditions the whole was paid. But why could they not have asked him this by their original bill? They might have put to him the questions—Have you been paid the whole; or, if not, how much have you been paid, and upon what terms have you been indemnified as to the remainder? Although one is desirous of giving room for every inquiry in these cases, yet, if a party neglects his opportunities of inquiring in the first instance, he ought not to be allowed to make suggestions afterwards which he should have made at first. I should have thought

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that in this bill the plaintiffs would have pointed their inquiries to every circumstance under which the arrangement could have been made.

The ground, therefore, on which I decide this motion (and it is a little beside the arguments), is this—that the plaintiffs had the opportunities of making the inquiries originally which they now seek too late.

Motion refused.

Dec. 1st.

The laches of the plaintiffs, in a bill for discovery in aid of a defence at law, is not a ground for depriving them of a commission for the examination of witnesses abroad, though it is a ground for putting them to more severe terms.

On this day a motion was made, on the part of the Corporation of the London Assurance, that the injunction might be revived, and a commission issue for the examination of witnesses beyond the seas. The motion was supported by affidavit that there were certain witnesses abroad whose evidence was material and necessary for the defence at law.

The motion was opposed on the ground of the laches of the plaintiffs in equity.

ALDERSON, B.—It is clear the cause cannot be tried without these witnesses. The laches of the plaintiffs is a reason for putting them on more severe terms, but not for putting the case out of the ordinary course of justice.

Ordered, that the sum claimed be invested in Exchequer bills, within a fortnight, to abide the event of the action, and that interest on the sum claimed, at 4l. per cent. per annum, be paid into Court within the same time.

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C. 4. 3 & 3
BY articles of agreement under seal, dated the 4th January, 1796, and made between William Jones of the first part, Sarah Morgan of the second part, and John Morgan of the third part, (being the settlement executed previously to the marriage between William Jones and Sarah Morgan), it was witnessed that in consideration of the intended marriage, and of the sum of 200*l.* and certain furniture, the marriage portion of Sarah Morgan, the said William Jones did covenant with the said John Morgan, his executors and administrators, that in case the intended marriage should take effect, and William Jones should happen to survive his intended wife, and there should be one or more child or children of the marriage living at the death of the said Sarah Morgan, then the said William Jones, his heirs, executors, or administrators, should pay or cause to be paid to such child, or among such children (if more than one) equally, share and share alike, the sum of 100*l.*, when and as such child or children should respectively attain the age of twenty-one years, with the interest thereof in the meanwhile for their support and maintenance.

The marriage between William Jones and Sarah Morgan was solemnized soon after the execution of this deed, and in December, 1808, Sarah died, leaving her husband and seven children surviving her. The children all attained the age of twenty-one years.

In the year 1811 William Jones married the plaintiff, who was a widow with several children. Shortly previous to that marriage both parties executed certain indentures of lease and release, dated respectively the 15th and 16th February, 1811. By the release, reciting the intended marriage, and a power of appointment possessed by

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W. J., by a settlement made upon his first marriage, covenanted that, upon the death of his intended wife, he would provide a portion of 100*l.* to be paid to the children of the marriage in equal shares, upon their severally attaining 21, with interest in the mean time for their maintenance. The marriage took effect, and the wife died in the lifetime of W. J., leaving seven children. W. J. married again, and, by a deed made in contemplation of that marriage, he conveyed land to trustees, upon trust after his death, or in his lifetime, if he should consent, to raise 600*l.* in trust for the six younger children of his first marriage, to be divided between them in equal shares, such shares to be vested in them at 21. The children at-

tained their ages of 21, and received their portions under the second settlement:—*Held*, that those portions were in satisfaction of the provision made for them by the first settlement.

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William Jones, but the precise nature of which did not appear upon the pleadings or in evidence, and further reciting that William Jones had determined to exercise that power, and to make the conveyance thereafter contained for the advancement of his children by Sarah his late wife, it was witnessed that the said William Jones did, in consideration of natural love and affection for his said children, and by virtue of the said power, and of every other power &c., direct and appoint, and did also release and convey a certain messuage called Llwynyr Inn, in the county of Carmarthen, with the appurtenances, unto D. L. Harries and his heirs, to the use of the said William Jones and his assigns for his life, with remainder to the use of James Morgan, his executors, &c., for the term of 1000 years, with remainder, subject to the term, to the use of William Jones the younger, eldest son of the said William Jones, his heirs and assigns. And it was declared that the said term of 1000 years was limited to the said James Morgan, upon trust, that he, his executors, administrators, or assigns, after the decease of the said William Jones, or in his lifetime with his consent, to be signified in the manner therein mentioned, should, by demising, assigning, or otherwise disposing of the said hereditaments, &c., for the whole or any part of the said term, or by and out of the rents and profits of the said premises, levy and raise the sum of 600*l.* of lawful money, with interest for the same, at or not exceeding 5*l.* per cent. per annum, in trust for the six younger children, by name, of the said William Jones, by the said Sarah, his first wife, to be divided between them in equal shares as tenants in common, the shares of the daughters to be vested at their age of twenty-one, or marriage, and those of the sons to be vested at their age of twenty-one, or upon their dying under that age, leaving issue. The deed then contained the usual clauses of accruer, maintenance, advancement, (the advancement being to the amount of one-half of each

child's expectant share), and also a proviso that all persons claiming any benefit under the indenture, should, under the doctrine of election, be bound to give effect to the same indenture, and to every limitation and provision therein contained.

By another indenture (not mentioned in the bill) bearing date the 18th of February, 1811, and which was likewise executed shortly previous to the marriage of William Jones with the plaintiff, the sum of 400*l.*, part of a sum of 500*l.*, which was owing to the plaintiff, was settled to her separate use for life, with a proviso that upon her decease the principal should be divided equally between the children of William Jones by the plaintiff, and the children of the plaintiff by her first husband; and William Jones covenanted to transfer the sum of 300*l.* to trustees, upon trust, to pay the interest thereof to the plaintiff for her life, in case she should survive William Jones, and after her decease, to the children of William Jones by the plaintiff. By the same indenture, a tenement called Cefeugole, value about 30*l.* a year, was, in confirmation of her first husband's will, settled upon the plaintiff for life, with remainder to her children by her first marriage; and a farm called Maesllan, value about 50*l.* a year, to which William Jones was entitled for lives, was settled upon the plaintiff during her life or widowhood, in case she should survive William Jones, with remainder to the heirs of William Jones.

In April, 1832, William Jones died, leaving the seven children of his first marriage surviving him. They all received their shares of the 600*l.*, under the indenture of the 16th of February, 1811, with interest from the time of their father's death. In March, 1834, John Morgan, the trustee, under the articles of agreement of January, 1796, brought his action of covenant against the plaintiff as administratrix of her late husband, to recover the 100*l.* covenanted to be paid under the articles; whereupon the

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plaintiff filed the present bill to restrain that action, and that it might be declared that the benefits secured by the indenture of the 16th of February, 1811, to the children of William Jones by his first marriage, were in lieu and satisfaction of the provision made for them by the articles of agreement of the 4th of January, 1796.

The plaintiff having obtained the common injunction to stay the proceedings at law,

Mr. *G. Richards* and Mr. *Puller* now shewed cause against dissolving the injunction.—The children of the first marriage of William Jones are bound to elect between the benefits conferred upon them by the two settlements. No doubt every parent is under a moral obligation to provide portions for his children; but if, after having provided such portions by will or settlement, he, in the course of his life, makes another provision for them, a court of equity will interfere to confine them to one of these provisions, unless it can be shewn that he intended them to have both: *Wood v. Briant* (a), *Seed v. Bradford* (b), *Hinchcliffe v. Hinchcliffe* (c), *Sparkes v. Cator* (d), *Garthshore v. Chalie* (e), *Chave v. Farrant* (f). The same principle is applicable here as in the case of legacies, which are adeemed, if the purpose for which they are given is anticipated by the testator in his lifetime. Speaking of such a case, Lord Manners says—"Suppose the testator had by his will left 5000*l.* to his brother to buy a house in Merrion Square, and afterwards he himself buys one, which he gives to his brother,—are there to be two houses bought?" [The *Lord Chief Baron*.—This is not the case of a legacy, but of a debt. It is clearly established, that if a man owes a debt, and afterwards gives his creditor a sum of money equal in amount to the debt, it is to be

(a) 2 Atk. 521.

(b) 1 Ves. sen. 501.

(c) 3 Ves. 516.

(d) Id. 530.

(e) 10 Ves. 1.

(f) 18 Ves. 8.

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taken as a satisfaction, not as a gift. But the case which has been adverted to of a legacy may stand on a different ground.] It is submitted that the plaintiff is entitled to the benefit of the principles applicable to both cases. But, at all events, this is a debt arising on a marriage settlement. Part of the money in settlement was the wife's marriage portion, and on the strength of that, as well as of his own property, the husband made a provision for the children. It is immaterial, however, in regard to the doctrine as to double portions, whether the wife bring any fortune or not. If out of the common fund provision is made for the children, that is a satisfaction of the moral obligation which the parent is bound to fulfil. [The *Lord Chief Baron*.—Suppose he had lived, and upon the children coming of age the trustee under the first settlement had brought his action, could he have set up the second settlement in answer to that action?] He would be entitled to file a bill in equity declaring that he intended the second settlement as a satisfaction of the first, and calling on the donee to make his election. [The *Lord Chief Baron*.—My difficulty is, that the debt in the first settlement is due when the children come of age; that in the second, when the parent dies.] The difference in the time of payment is not sufficient to rebut the presumption, that the latter settlement was intended in satisfaction of the former. The general terms of the second deed are sufficient to raise that presumption without any express recital. Presumption of satisfaction is stronger in the case of a deed than in that of a will; because, as Lord Hardwicke observed, legacies naturally imply a bounty (a), and yet a legacy bequeathed by a parent to his child is *prima facie* satisfied by any subsequent provision made for that child by the parent. That doctrine, and the general leaning of the court against double portions, is fully stated and discussed by Lord

(a) See 3 Atk. 97.

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Eldon in *Ex parte Pye* (a) by Lord *Alvanley* in *Hinchcliffe v. Hinchcliffe* (c), and by Lord *Brougham* in *Whar-ton v. Lord Durham* (c). The onus lies upon the other side to shew, that their second settlement was not intended as a satisfaction. The recital as to the children's advancement is very important, and the deed concludes with a remarkable declaration as to election, which cannot be explained, except upon the supposition that the children were intended to elect. It must be admitted that the difference in the subject matter of the gift in each case is evidence, as far as it goes, against satisfaction: *Weal v. Rice* (d); but it is merely evidence, and liable to be rebutted.

Mr. Simpkinson and *Mr. Romilly, contrà*.—There is no case like the present in its circumstances. There is no doubt as to the general proposition contended for. It is not disputed that either a debt or a portion may be satisfied by payment in the lifetime of the party; with this distinction, however, between them—that in the case of a debt, payment of part is not a satisfaction, while, in the case of portions, it is a satisfaction *pro tanto*. In other respects the two cases are the same in principle, and turn upon the intention of the party to satisfy the claim. How is that intention manifested here? It is admitted by the plaintiff that the only claim was 100*l.*, arising under articles of agreement between Jones and his first wife. It appears upon those articles that the covenant which the defendants seek to enforce, was in consideration, not only of marriage, but of 200*l.* and household furniture, which were the first wife's property. In consideration of that, Jones covenants to pay the sum of 100*l.* equally amongst the children on their attaining twenty-one; and

(a) 18 Ves. 151.
 (b) 3 Ves. 526.

(c) 3 M. & K. 478.
 (d) 2 R. & M. 251.

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he covenants further, not merely with reference to the contingent claim of maintenance, but that he will pay interest on the 100*l*. It is doubtful on the face of the deed from what time the interest is intended to run, but, under any construction of the instrument, it began to run from the death of the first wife. That event took place in December, 1808, and there were seven children of the marriage. In 1811, Jones marries a second wife, the present plaintiff. Though they repudiate their settlement as a marriage settlement, it is stated in the bill to have been made in contemplation of the marriage. The bill omits to allude to the deed of the 18th of February; but if that deed be read in connection with the other, it would appear that Llwynyr Inn was the property of the first wife; at all events, there is nothing in the pleadings or evidence to shew the contrary; and it is clear that Jones had not the fee in that estate, the deed reciting, and the bill in general terms alluding to, a power of appointment which he had over it. The deed of the 16th of February is expressly confined to the property of the second wife, and the unsettled property of Jones; and the whole of that is settled upon the children of the second marriage. If the aggregate of the settled property be considered, it will be seen that 100*l*. and 600*l*., making in all 700*l*., formed the entire portion for the children of Jones's first marriage, and that 400*l*. and 300*l*., making also 700*l*., formed the entire portion for the children of his second marriage. Will the Court, then, believe that this sum of 600*l*. was given in lieu of the 100*l*. originally settled upon the children of the first marriage? But, independently of these minute circumstances, there is nothing on the face of the second settlement from which to collect that it was meant to be in satisfaction of the first. The cases on the subject are collected in Mr. Sanders's note to *Bellasis v. Uthwatt* (a),

(a) 1 Atk. 426.

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where it is stated, that, in order to raise a presumption of satisfaction, there must be no material variance in the nature of the two provisions or in the time of their respective payments. In this case there is a material variation. Under the first settlement, there is a mere personal undertaking on the part of the father to raise the portion; under the second settlement, the portion is to be raised out of land. In the former case the money is to be raised upon the death of the first wife and paid to the children at twenty-one, with a proviso that the interest upon the sum shall be applied for their maintenance in the meantime. In the latter case the money is to be raised at a totally different period. As to the eldest son, it is clear that the gift to him of the land in remainder could not be a satisfaction as to him. Suppose any of the children coming of age had demanded of the trustee the portion due to him under the first settlement, could it have been said, in answer to his claim, that he had elected to take under the second? In *Fortescue v. Barnett* (a), the settlor was not the father, but only the brother of the party for whom the settlement was made; yet it was held that the provision which the settlor had made for his sister and her children, by means of a policy of insurance on his life, was not satisfied by a subsequent provision made for them by his will, and by his putting her in possession of a freehold estate. [The *Lord Chief Baron*.—The gift of the freehold to the sister would be no provision for the children; and he might alter the will the next day.]

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THE LORD CHIEF BARON.—This cause came before me upon a motion to dissolve an injunction which had been granted to restrain an action brought against Mrs. Jones and others, who are the personal representatives of her late husband, upon a deed of covenant executed by him in 1796, when he married his first wife, by which, in con-

(a) 3 M. & K. 36.

sideration of 200*l.*, which he received together with certain household goods as her fortune, he bound himself to pay 100*l.*, with interest at 5*l.* per cent., equally between the children he should have by her, when they attained the age of twenty-one years. He had by that marriage seven children. She died, and he afterwards married a lady of the name of Jones, who had some property. Upon this occasion also he executed a marriage settlement. He executed a deed by which his own estate was conveyed to trustees (one of whom seems to have been a connexion of his former wife), upon trust, by mortgage or otherwise, to raise 600*l.* to be paid in equal portions to the six younger children by his marriage with his former wife, with interest upon those sums from the time they should attain twenty-one years of age, with remainder over in case of their death before that time. As to the residue of his property, he gave it to his eldest son; and then there is a clause in the deed, that the trustees shall execute a power of raising money in his lifetime, if he shall call upon them so to do; so that the trustees are either upon his request in his lifetime to raise 600*l.* to be paid to the objects of his bounty, or if not requested so to do, then, upon his death, to raise the money and pay it to the children.

It appears by the bill, that upon the death of Jones, the trustees under the second settlement did raise and pay the money to the parties interested, and that the eldest son is in possession of the estate, and that notwithstanding that payment, the trustee in the original settlement has brought his action of covenant against Mrs. Jones, as the personal representative of her husband, in order to recover a portion of the money due under the covenant in that settlement, with interest from the marriage. That portion would be the greater part of 100*l.*, with interest upon it.

The plaintiff in the bill contends that the debt which her husband had covenanted to pay to the children by his

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former marriage, was satisfied by the provision he made for them by the deed when he married the plaintiff. If so, Morgan ought not to bring the action, and the injunction must be continued. If, on the other hand, that is not a satisfaction, he ought to be allowed to bring his action. That question is resolved into this—whether the provision made to the children on the second marriage is to be taken in satisfaction of the provision which he made upon his first marriage settlement, which was, in some sort, a specific debt, which he contracted to pay.

It is not necessary to state the authorities, because it is agreed that they may all be resolved into this,—That it is a question of intention whether a legacy is to be deemed to be satisfied by payment in the lifetime of a testator, or by a provision tantamount to it; and that it is to be considered the intention of the party that it should be satisfied, unless something to the contrary appear. If, in his lifetime, having made a provision for his children by will, he pays to the children the portion so provided for them, the presumption is, that his intention was to anticipate the legacy; and unless there is something to lead to a contrary conclusion, the legacy is held to be adeemed. I have not been able to find any case precisely similar to this, but the principle which I have just stated is fully applicable to this case. It may be also referred to another class of cases, where a party owing a debt, and leaving to his creditor a legacy to an amount larger than or equal to the debt, the presumption is that he meant to satisfy the debt, unless the contrary appear.

Here the principle is applicable to portions created by deed. I know no rule of law which makes any distinction between the case of a will and a deed. By the first settlement, the portion with interest becomes a debt due from the father to his children. Now the father is considering what he shall do upon his second marriage. It is natural he should take into consideration what he has

done before; and if I find he binds himself to give them at least the same amount of portion as before, I should presume from his subsequent act that he meant to satisfy the debt. Suppose then you take it as a debt. The argument on the other side is, that the original portion of 100*l.* was due to the children at twenty-one, whether the father was alive or not, whereas the last was due only at his death. That is an important argument, no doubt; but I find that the deed made on the second marriage gives the trustees liberty to raise the portions in his lifetime, if he call upon upon them so to do. One inquires on what event he would call upon them? Why, he would call upon them if it was necessary to advance a child,—or a child, upon arriving at twenty-one, should exact payment of his portion under the former deed.

Let me suppose this case: Suppose any of the children in the father's lifetime should say to his father, I wish you to call upon the trustees to pay the portion of 100*l.* due to me under your first marriage settlement. The father would say, I cannot resist that, but I will call upon the trustees of the second settlement to raise it. I have power so to do, and I will raise the money and pay you by those means. Suppose then the 100*l.*, or a portion of it, equal to the child's share of the 700*l.*, is paid to him, the trustees keeping the rest in their hands till the father's death; and suppose, upon that event happening, the same child should make another call for his share under the first deed; if an action were brought for the amount on the covenant contained in that deed, I am not clear the payment already made might not be the subject of a set-off at law, and, *a fortiori*, we are not bound by a more strict mode of proceeding in equity.

Then there is a clause in the second deed, which, though not very intelligible, can bear no other construction, than that the father meant that one provision should be a satisfaction for the other; namely, the clause that the

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party claiming under that deed shall be bound by the law of election. This is clumsily expressed, no doubt; but if it has any meaning, it must mean to refer to the former deed.

Upon the whole, I think, upon the authority of all the cases, and upon principle, that the provision made in 1811 for raising and paying the money to those children, is equivalent to satisfaction of the debt for which the father made himself liable to them under the first settlement. The injunction, therefore, must be made perpetual.

Order accordingly.

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James v. White, 7 New 506. Stanley v. Chapman, 4 New 101.
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If a man, being indebted to his own agent, authorize the agent to receive money due to him from his debtor, intending that the agent should thereout pay himself his own debt, he thereby gives the agent an implied authority to receive payment, to the extent of his own debt, in any manner he may think fit; consequently, the amount of the agent's own debt may be written off in account between him and the debtor.

A debtor, who pays the amount of his debt to the agent of his creditor, must pay it in cash, unless he can shew that the agent had authority to receive payment in any other way.

IN the year 1818, Francis Henry Barker, being indebted to the defendant in various sums of money, and having sold to him his life interest in certain property situate at Clapcott and Wallingford, in the county of Berkshire, contracted to sell to him the reversion in fee of that property at the price of 1,500*l*. The contract was not reduced into writing, but the treaty for the sale was conducted by one Churchill, who had for many years acted as solicitor and agent of Barker. The purchase was not completed till the year 1823. In February, 1822, while a considerable sum still remained due from the defendant on account of the purchase money, Barker executed the several conveyances of the property to the defendant, and delivered them to Churchill. He at the same time wrote and sent to the defendant a letter in the following words: "Dear sir, I have executed the conveyance to you of the estate at Clapcott and Wallingford, and the balance of the sum due from you to me you will please to pay to Mr. Samuel Churchill, on the deeds being delivered; the in-

terest upon the purchase money you will also be so good as to settle with Mr. Churchill. I am, &c., F. H. Barker."

In March 1822, the sum remaining due from the defendant to Barker, in respect of the purchase-money, was 10,760*l.* 4*s.* 8½*d.* According to an account kept by Churchill, and in his handwriting, this sum was reduced from time to time by successive payments made by the defendant, the last payment being made on the 10th April, 1823. Affixed to the last item in the account were the following words:—"This account settled with Mr. Greenwood, and the whole sum received by me as agent to Mr. Barker:—Samuel Churchill." The account likewise contained the following item:—"March 25th—Received of Mr. Greenwood, on further account, as the agent and by the authority of Mr. Barker, 7,675*l.* 19*s.* 10*d.*" This sum however was not actually paid to Churchill, but was, in October, 1822, written off in an account between Churchill and the defendant, Churchill being the receiver of interest and other sums, which were from time to time payable to the defendant. At the time when this transaction took place, the deeds of conveyance, which had been executed by Barker, were delivered by Churchill to the defendant.

In March 1827, a commission of bankrupt issued against Churchill, and Barker, having at that time some claims against Churchill's estate, wrote to the defendant for an explanation of Churchill's accounts relative to the purchase made by the defendant. In answer to this application the defendant wrote as follows:—"On the settlement of the long standing accounts between us by Mr. Samuel Churchill, on the 25th March, 1822, there was a balance of 10,760*l.* 4*s.* 8½*d.* due to you, which was paid to Mr. Churchill by two payments; the first payment was 7,675*l.* 19*s.* 10*d.* The second payment was 3,084*l.* 4*s.* 10½*d.* Mr. East, Mr. C.'s clerk, is acquainted with all the particulars."

Barker having died in February, 1830, the present bill

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was filed by his executrix, charging that the statements made by the defendant and Churchill, that the sum of 7,675*l.* 19*s.* 10*d.* had actually been paid, were false and fraudulent; that the giving of credit by Churchill to the defendant for that sum was the result of a collusive scheme between the defendant and Churchill, and was unknown to Barker up to the time of his death, and that it did not amount in law or equity to payment of that sum by the defendant to or for the use of Barker. The bill prayed a declaration that Barker and his representatives had a lien in equity on the purchased estates, for the purchase-money remaining unpaid; and that an account might be taken of such purchase-money; and that in taking the account the defendant might be allowed credit for such sums of money only as he had actually paid to the use of Barker, and not for any monies written off in account between the defendant and Churchill.

The defendant, by his answer, denied the charges of collusion, and stated his belief that Barker was well acquainted with the manner in which the purchase was paid. He also stated, that he did not, by using the word "payments" and "payment" in his letter to Barker, mean to represent to Barker that the payment of the sum of 7,695*l.* 19*s.* 10*d.* was made in cash, but he used those words solely in explanation of Churchill's accounts as required by Barker, and to shew that in those accounts Barker was entitled to credit for the sums mentioned.

In support of the defendant's case, several letters were read to shew that in October, 1822, Barker was indebted to Churchill, and intended that the debt should be paid out of the monies coming from the defendant, but the amount of the debt did not appear.

Mr. *Swanston*, Mr. *Ellison*, and Mr. *G. Richards* for the plaintiff. The fact that this sum was written off in account between the defendant and Churchill was not

known until after Barker's decease. It is clear that Barker supposed it had been paid to his agent in cash. Churchill had no authority to settle with the defendant in this manner; at all events it is for the defendant to shew that Churchill had a clear authority to make such an arrangement. An authority to receive payment is not an authority to set off: *Todd v. Reid* (a), *Russell v. Bangley* (b). If Churchill departed from his written authority, the defendant cannot rely on any parol variation of his instructions. Such evidence, it is submitted, is not admissible; but even if it be, the Court will not act upon it without submitting the case to a jury. An opportunity should be given to the plaintiff to cross-examine Churchill as to his authority.

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Mr. *Simpkinson* and Mr. *Kenyon Parker*, for the defendant.—If Barker, at the time of writing off this sum, was indebted to Churchill in an equal or larger amount, such a set-off would amount to payment. [*Alderson*, B. Where a man makes his creditor his agent to receive from his debtor the amount of the debt, the question is whether he does not make all the payments to that creditor payment to himself. *Todd v. Reid* is distinguishable from the present case. There, if the broker had retained the money, he would have committed a breach of duty. It was the money of the assured in his hands. Here, if the money had been actually paid to Churchill, it would not have been his duty to pay it over to Barker. He would have had a right to retain it under the statutes of set-off.] In the case referred to it would have been a breach of duty in the party, as broker, to retain the money. Here the only question is, whether Churchill had a claim against Barker equal to or greater than the amount of the claim by Barker against Greenwood, in either of which cases he

(a) 4 B. & Ald. 210; 3 Stark. 16.

(b) 4 B. & A. 395.

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would have a right to retain. There are several authorities for the defendant: *Paley, Prin. and Agent*, 287; *Drinkwater v. Goodwin* (a), *Hudson v. Granger* (b).

Mr. *Swanston* in reply.

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ALDERSON, B.—This was a bill filed by the plaintiff, claiming an account of certain monies paid by the defendant as the purchaser of an estate, sold by the late Rev. Mr. Barker to him, through the agency of a Mr. Churchill, a solicitor. The bill prays a declaration that there is a lien on the estate for the purchase-money remaining unpaid. There is no doubt that if the purchase-money remains unpaid, the plaintiff is entitled to the declaration and lien. There is no doubt, also, as to the payment of all the purchase-money except the sum of 7,675*l.* 19*s.* 8*d.* As to that, the facts are these: a distinct authority was given to Churchill, with the assent of the plaintiff, to receive the purchase-money from the defendant. Now, this sum of money was not actually paid; but was, on the 19th October, 1822, set off in an account between Churchill and the defendant, Churchill being indebted to the defendant to that amount at the time.

I think it is satisfactorily made out by the correspondence that Mr. Barker was indebted to Mr. Churchill in some amount, and intended that Mr. Churchill's debt should be paid, and only the balance of the monies received by Churchill from the defendant paid over to himself.

I must also assume, for the present, which, however, as far as the facts are before me, is very questionable, that the amount of this debt, on the 19th October, 1822, was more than 7,675*l.* 19*s.* 8*d.*, the sum set off in account between Churchill and the defendant; and then the question is this,—if a man, being indebted to his own agent,

(a) Cowp. 251.

(b) 5 B. & Ald. 27.

authorize that agent to receive money due to him from his debtor, intending that he should thereout pay himself his own debt, does he authorize that agent impliedly, to the extent at least of that debt, to receive payment in any way he may think fit? I think he does. An agent, with a general authority like this, is, as it seems to me, only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes to his principal. If, therefore, he is bound to pay the whole over to the principal, he must receive it in cash from the debtor. And a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this, his duty. If, therefore, the agent be not a creditor of his principal, he must receive the whole in cash; for, otherwise, he does not, by the act done between him and the debtor, put himself into the situation of being able to pay it over. Such were the cases of *Todd v. Reid* (a), *Russell v. Bangley* (b), *Bartlett v. Pentland* (c), and *Scott v. Irving* (d). For in those cases the assured was entitled, as between himself and the broker, to the whole amount which the latter might have received in cash from the underwriter. But if the agent be himself a creditor of the principal, and the principal intends, when he makes him his agent to receive, that he shall retain his own debt out of the sum received, his only duty is to pay over to the principal the balance, after deducting his own debt. If he therefore takes care to receive in cash that balance, he, as it seems to me, puts himself into a situation as completely to discharge his duty as if he had received the whole in cash. For what possible difference can it make to the principal whether his agent receives the whole and retains part, or only receives that balance which he himself is entitled to receive from the agent? A person

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(a) 4 B. & Ald. 210.

(b) 4 B. & Ald. 395.

(c) 10 B. & C. 760.

(d) 1 B. & Ad. 605.

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however who does not take the ordinary and proper course of paying the whole in money, must take care to be able to prove that the agent is in this situation. If, therefore, he pays by a settlement in account, he takes upon himself, in such a case as this, the risk of being able to shew the debt due from the principal to the agent, and the specific circumstances under which the agent was appointed to receive the money. Here these circumstances are made out, but still he must shew that there was a debt due to Churchill from Mr. Barker, equal at least to the sum set off in account between himself and Churchill.

I propose therefore to refer this question to the Master, namely, whether, on the 19th of October, 1822, Barker the testator was indebted to Churchill in any and what amount. If the defendant can shew to the Master's satisfaction that there was such a debt then due, and that it exceeded or equalled the sum set off in account between him and Churchill, this bill will be dismissed; but certainly without costs, because the bill was most properly filed to compel such proof being given, and its necessity arose from the unusual mode of settlement adopted by the defendant. If, however, the defendant cannot satisfy the Master of this, the plaintiff will be entitled to a declaration that he is to have a lien for the whole, if there be no debt—for the balance, if the debt due to Churchill at the time in question (for the subsequent accounts between Barker and Churchill are wholly immaterial) was less than the sum set off in account between Churchill and the defendant, and will have a decree with costs to that effect.

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The Rev. HENRY THORPE - - - Plaintiff;

and

THOMAS MATTINGLEY, WILLIAM BUDD,
GEORGE BLISS, CHARLES COWPER, and } Defendants.
EDMUND PLOWDEN

C3. 50a
THE bill was filed by the plaintiff as rector of the rectory and parish church of Aston-le-Walls, in the county of Northampton, against the several defendants (except Edmund Plowden, who was made a defendant by amendment), for an account of the titheable matters had and taken by them on their respective farms and lands in the parish of Aston since the year 1831, the time of the institution and induction of the plaintiff into the rectory, and for an account and satisfaction of the tithes.

The defendants to the original bill (the defendants the occupiers) by their answer stated, that at the time of the making of the agreement thereafter set forth, W. Plowden, of Aston, in the county of Northampton, was seised in fee of the manor of Aston, and of the rectory of Aston-le-Walls, which was appendant to the said manor, and that the said manor comprised the lands and tenements thereafter mentioned to be then in the occupation of the defendants, and also the lands which were holden by the plaintiff as rector of Aston-le-Walls aforesaid, by virtue of the exchange thereafter set forth.

Feb. 8th, 15th.

To a rector's bill against occupiers of lands for an account of tithes, the defendants, by their answer, set up an ancient agreement between a former rector of the rectory and the then owner of the lands occupied by the defendants, and who was also the patron of the living; by which agreement certain lands enjoyed by the present rector were allotted to the rector in exchange for his glebe lands, which were then dispersed in the common fields, and a rent-charge of 40*l.* a year was

granted to the rector; in consideration of which exchange and annuity, the lands occupied by the defendants were discharged from tithes. The defendants proved that the agreement was not only approved by the then bishop of the diocese, but had been established by a decree of the Court of Chancery, and had been acted upon for upwards of a century; and that the arrangement was not only beneficial to the rector at the time when it was entered into, but that it was made with reference to the probable future increase in the value of the tithes, and that it was advantageous to the plaintiff at the time of the filing of the bill:—*Held*, however, that the agreement was absolutely void under the disabling statutes; and that, being void, the decree of the Court of Chancery could not give it validity; and an account of the tithes was decreed.

Where a bill for tithes was filed against occupiers of lands within the time prescribed by the statute 2 & 3 Will. 4, c. 100, and the bill was subsequently, and after the period limited by the act, amended, by making the owner of the lands a party:—*Held*, that the original and the amended bill formed but one record, and that the suit was therefore instituted against the owner within the time prescribed by the statute.

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That by an agreement, bearing date the 1st day of March, 1711, duly made and signed between the said W. Plowden, as lord of the manor of Aston, and patron of the rectory of Aston-in-the-Walls, of the one part, and the Rev. J. Wilson, the then incumbent of the rectory, of the other part; after reciting that the said W. Plowden was lord of the manor of Aston, and patron of the said church of Aston-in-the-Walls, and was also seised of divers parcels of land lying dispersed in the common fields of Aston aforesaid; and that the said J. Wilson was the then rector and incumbent of and in the said church of Aston, and in right thereof was seised of divers other parcels of land lying also dispersed in the said common fields, and also of a parcel of ground lying in a close called Aston Close, in Appletree, in the said parish of Aston, being the glebe-lands belonging to the said rectory, and also in right of his said church was entitled to the tithes of all sorts, arising as well out of the common fields as out of the demesne lands of the said W. Plowden in Aston; and further reciting, that the lands in the common fields therein-before mentioned were of little value, lying so dispersed, and that it was apprehended that it would be a great improvement, as well to the said church, as to the said W. Plowden's estate in Aston aforesaid, if the said common fields were inclosed, and certain exchanges were made; but that the said W. Plowden being desirous that the rights and profits of the said church might be preserved and ascertained, and that the said J. Wilson and his successors might have and enjoy in right of his said church an advantage by a just proportion of the improvement expected from such inclosure, it was by the now stating instrument agreed, that all the several pieces or parcels of the common fields of Aston aforesaid, therein, and in the answer also respectively, described and set forth, should, together with the church-yard, parsonage-house and close, gardens, orchards, and walls dividing a garden and orchard from the estate of the said W. Plowden, and all yards, out-

houses, and buildings, and all grounds belonging thereto, for ever thereafter be deemed and taken as the glebe land of and belonging to the church of Aston-in-the-Walls aforesaid; and, as such, should be for ever enjoyed by the said J. Wilson and his successors, rectors of the said church; and also that the sum of 40*l.* per annum, payable half-yearly, free from all taxes or payments whatsoever, unless for taxes charged by act of Parliament on the said annuity itself, should be issuing out of and chargeable upon the said W. Plowden's said manor, messuages, lands, tenements, and hereditaments, situate, lying, and being in Aston-in-the-Walls aforesaid, and be secured and made payable to, and be for ever for the use and benefit of the said J. Wilson and his successors, rectors of the said church of Aston aforesaid, with power of distress for the said J. Wilson and his successors, in case of nonpayment thereof. And it was by the said articles further agreed, that the said J. Wilson and his successors, rectors of the said church, should at all times thereafter, as often as occasion should require, have privilege to dig, take, and carry away from every the usual and open pits within the said W. Plowden's said manor, such stone, gravel, or mortar as should from time to time be needful for the repairing and supporting all buildings, walls, and highways, and other ways and passages belonging to the said rectory; and that neither the said J. Wilson, nor his successors, rectors of the said church, should be chargeable with any other or any part of any other highways except that which was part of the glebe land, and leading from Aston towards Appletree, and four-score yards of the lane by the parsonage meadow downwards, from the place called the Hay Gap, as the same was measured, set out, and known. And it was also thereby further agreed, that the said J. Wilson or his successors should not, by reason of removal of cattle from any part of Aston aforesaid not within such agreement, unto and upon any part of the said W. Plow-

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den's estate, by that means be prevented of his tithes, but in case of such removal the said W. Plowden, his heirs and assigns, should and would take effectual care to prevent such loss to the rector for the time being. And further also, that the said J. Wilson and his successors should at all times have liberty from time to time, as occasion should require, of coming upon the grounds adjoining to their houses and walls for building and repairing the same, and that they should for ever be freed from the payment of one-fourth per annum for weeding the meadow in Aston aforesaid; and that the watercourse which formerly ran through Carret Close in Aston aforesaid, and then stopped, to the detriment of the said J. Wilson and his successors, should forthwith be cleared and kept open. And in consideration of the premises and privileges agreed to be for ever made over and secured to the said J. Wilson and his successors, rectors of Aston aforesaid, the said J. Wilson did by the said articles agree to and with the said W. Plowden, his heirs and assigns, that all those parcels and pieces of land formerly reputed and taken as the glebe land of or belonging to the church of Aston aforesaid, and lying in the said common fields of Aston aforesaid, and which were theretofore in the possession of the said J. Wilson or his tenants, and the said parcel of ground thereinbefore mentioned to lie in the said close called Aston Close in Appletree aforesaid, except such parts as did lie and were in the said parcels of ground and meadow thereby allotted and appointed for glebe lands, and which were to be secured and made over to the said J. Wilson and his successors as aforesaid, should from thenceforth be enjoyed by the said W. Plowden and his heirs, as his and their own proper estate for ever. And also that all lands, tenements, and hereditaments whereof the said W. Plowden was possessed as owner in Aston aforesaid, and every of them, should for ever thereafter be freed and discharged from the payment of all manner of tenths, tithes,

oblations, obventions, moduses, and all other dues therefore due and payable out of the said W. Plowden's estate in Aston aforesaid, (except and other as aforesaid), and also except such tithes and dues as were properly personal, and did not purely arise of said W. Plowden's estate, and such as were the Easter roll, and fees due for marriages, christenings, and mortuaries and other surplice fees. And by the said articles it was further agreed, that the four lands, with the bulks and stades thereto belonging in Aston aforesaid, known by the name of the town lands, should be enjoyed by the said W. Plowden, his heirs and assigns, as his own free estate, and in lieu and satisfaction thereof, one acre and a half excepted, which did lie in the furlong called Great Church-Way, should be given in exchange for the same for the purposes in the said articles mentioned.

That upon or shortly after the signing of this agreement, the said W. Plowden, with the approbation of the said J. Wilson, enclosed the whole of the said common fields of the said manor of Aston-in-the-Walls, and duly set out the several parcels of land in the said agreement mentioned to be given to the said J. Wilson and his successors, rectors of the said church of Aston: and that the said J. Wilson shortly after the date of the said agreement entered upon, and that he, his successors, incumbents of the said rectory, had ever since been, and that the said plaintiff, as the present incumbent of the said church, was then in the possession and enjoyment of the last-mentioned pieces of land: and that the said W. Plowden, pursuant to the said agreement and the decree thereafter stated, also annexed to his own estate the several pieces of common lands mentioned in the said agreement, and which were thereby agreed to be given to him in exchange as aforesaid; and the said W. Plowden and his heirs and assigns had ever since been and then were seised and possessed of such last-mentioned lands and hereditaments.

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That the said pieces of land taken in exchange by the said W. Plowden under the said agreement were small pieces of land lying dispersedly in certain common fields within the said rectory, and which, as appeared by certain terriers and other ancient records, constituted the glebe lands of the said rectory.

That in or as of Michaelmas Term, 1714, the said W. Plowden filed his original bill of complaint in the High Court of Chancery, at Westminster, against the said J. Wilson, and also against the Right Reverend Father in God, Richard, then Lord Bishop of Peterborough, within which diocese the said rectory of Aston aforesaid was and is situate, and thereby, after stating the said agreement, and further stating, as the fact was, that the said W. Plowden and J. Wilson, to shew the justice of their design in the said exchange and inclosure, and that the rights of the said church were not prejudiced, but meliorated thereby, did, in the month of April, 1714, join in a petition to the said Bishop of Peterborough to inquire by commission into the nature of the aforesaid inclosure and exchange; and that the said bishop, by an instrument under his hand and episcopal seal, dated the 17th day of May, 1714, had certified the same to be for the benefit of the said church, so that the said W. Plowden did hope to enjoy the lands so exchanged as aforesaid; but although the said W. Plowden and J. Wilson were the only persons interested, and were satisfied as to the quality of the exchange, and were desirous to have the said agreement and inclosure perfected and established, yet the same could not be of force to bar the successors of the said J. Wilson, rectors of the said rectory, unless established by decree of the Court of Chancery: and that the said W. Plowden was apprehensive, in case he should at any time improve the ground inclosed and exchanged as aforesaid, it would encourage the said J. Wilson's successors to take the same, on pretence that the exchange was not of equal value at the time of the making thereof; and the said bill prayed that the said in-

closure, exchange, and articles of agreement might be established and directed to be carried into effect by the decree of the said High Court of Chancery, and that he might have the aid and assistance of the said Court.

That the said Bishop of Peterborough duly put in his answer to the said bill, and thereby admitted that on the petition of the said W. Plowden and J. Wilson, to him the said Bishop of Peterborough, a commission did issue to inquire into the nature of such exchange and inclosure; and whether the same were for the benefit of the said church or not; and that it was thereupon found to be much for the interest of the said church, and not only beneficial to the said J. Wilson, but also would be so to his successors, rectors of the said church, and therefore that he, the said defendant, was willing that the same should in all respects be ratified and confirmed by the decree of the said Court. And the said J. Wilson also duly appeared to and answered the said bill, and by his answer stated that he and the said W. Plowden had taken all precautions that the said exchanges and inclosures might be reasonable and just, and no party prejudiced thereby, and that he the said J. Wilson was ready and willing to ratify and confirm the same, and desirous also that the same should be confirmed and established by the decree of the Court.

That the said cause came on for hearing on the 25th day of July, 1715, before Sir John Trevor, the then Master of the Rolls, who did order and decree that the said articles of agreement entered into between the said W. Plowden and the said J. Wilson should be performed, and that the said exchange of lands should be confirmed and made perpetual, and that the said parties should hold and enjoy the said premises according to the said exchange, and that conveyances should be made pursuant thereto.

That some short time afterwards the said W. Plowden sold and conveyed the advowson of the said rectory to

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the President and Scholars of Saint John's College, in the University of Oxford, who, as the defendants believed, purchased the same with full knowledge of the said agreement, and had ever since been the patrons of the said church, but had not at any time theretofore questioned or impugned the said agreement, or any part thereof, but had acquiesced in and assented to the same.

That since the time when the said agreement was entered into and established by the decree of the Court of Chancery in manner aforesaid, the whole of the said manor of Aston-in-the-Walls (except the said several pieces of land, parts thereof, which in and by the said agreement were given to the rectory of Aston) had been tithe-free, and that no payment of any tithe in respect of the said manor, or any part thereof, except as aforesaid, had ever been made to or claimed by the rectors or incumbents of the parish of Aston, but such rectors of Aston had always held, possessed, and enjoyed, and the said plaintiff, as such rector, did then hold, possess, and enjoy the several pieces of land by the said agreement given or annexed to the said rectory of Aston, and the several privileges secured to the rectors of the said church by the same agreement; and the said annuity of 40*l.* had always been duly paid by the said W. Plowden and his heirs to such rectors, and had been duly paid to and received by the said plaintiff as such rector ever since he became the incumbent of the said rectory up to Michaelmas, 1832; and the said plaintiff had during his incumbency holden and enjoyed the said lands, and received and taken the said annual sum of 40*l.*, with full knowledge of the said exchange and agreement, and in affirmance thereof, and in lieu and satisfaction of all tithes of the said manor, and had thereby, as the defendants submitted and insisted, assented to and confirmed the said agreement, and was bound thereby.

That the said plaintiff was presented, instituted, and inducted into the rectory and parish church of Aston-le-

Walls some time in or about the month of December, 1831, and that the said plaintiff was duly and regularly presented, instituted, and inducted to the said rectory, and had ever since been and was then the lawful rector of the said parish and parish church, and had, ever since his said induction up to Michaelmas in the said year 1832, duly and regularly received the said annuity of 40*l.* as and by way of satisfaction of all tithes issuing out of the lands occupied by the said defendants as thereafter stated, and had also been and then was in the possession and enjoyment of the several pieces of land given to the rectory of the said parish church under the said exchange.

That, for the reasons aforesaid, they denied that, as such rector as in the said bill alleged, the plaintiff had ever since his said presentation, institution, and induction been, or that he then was, entitled to have, receive, and take all the tithes, both great and small, yearly arising, growing, renewing, and increasing within the said parish and rectory, and the titheable places thereof. The defendants admitted that they, in and previously to the year 1831, respectively held and occupied, and that they had ever since held and occupied, and did then hold and occupy the several farms and lands described in their answer, and that they had the several titheable matters stated in their answer. They admitted that, for the reasons therein stated, they had not set out or rendered the tithes of such titheable matters or things, or made any recompence or satisfaction for the same, inasmuch as the plaintiff had duly and regularly been paid the aforesaid annuity of 40*l.* up to Michaelmas in the year 1832, since which time he had refused to receive it, in lieu and composition of all such tithes, according to the said articles of agreement; and the plaintiff had never given any notice to the defendants, and never made any application to the said defendants to set out their tithes, previously to the month of June then last.

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They had heard that tithes in kind were paid for or in respect of the lands then occupied by them before the said agreement and exchange.

They believed that the said composition and exchange were very advantageous to the church and rectory of the parish of Aston, and were entered into with a due regard to the probable future increased value of the tithes of the manor of Aston, inasmuch as the value of such tithes, at the date of the said articles of agreement, was much below the sum of 40*l.* per annum, and that the said tithes had been shortly before let on lease at a rent of 24*l.* per annum.

They submitted and insisted that the aforesaid agreement was entire, and that the composition for tithes, and the exchange thereby made, was one contract and transaction, and that the said W. Plowden, party thereto, would not have given in exchange the lands which were then so given by him to the rectors of the said parish but for such contract and engagement to accept the said annuity in lieu and perpetual satisfaction of the said tithes; and therefore, in case the Court should be of opinion that the composition was no longer subsisting, then the defendants submitted that the exchange of the glebe lands of the said parish of Aston for other parts of the common fields of the said parish comprised in the said articles, was void, and that the plaintiff, as such rector, ought to give up and reconvey the several pieces of land then in his occupation and enjoyment, and which were so exchanged for the glebe lands of the said parish under the said agreement; and they submitted that Edmund Plowden, who was then the lord of the said manor of Aston, ought to be made a party to the suit, and that the Court could make no decree in his absence.

The plaintiff amended his bill, by making the defendant, Edmund Plowden, a party thereto.

The defendant Plowden put in a plea to the plaintiff's

bill, by which he pleaded in bar the agreement, and the decree in Chancery establishing it, stated in the answer of the other defendants, and also the statute the 2 & 3 Will. 4, c. 100, for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of tithes (a).

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(a) By the 1st section of this statute it is enacted, "That all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our Lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained, and be deemed good and valid in law, upon evidence shewing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and in cases of claim to exemption or discharge, shewing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money, or other thing differing in amount, quality, or quantity from the *modus* claimed, or in case of claim to exemption or discharge, the render or payment of tithes, or of money, or other matter in lieu thereof, shall be shewn to have taken place at some

time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such case the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence shewing such payment or render of *modus* made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after

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This plea, on argument before the Lord Chief Baron, was overruled, and the defendant Plowden thereupon put in an answer, stating the agreement, the decree in Chancery, and other circumstances stated in the answers of the other defendants, and which had previously been stated by him in his plea, and insisting on the validity of the agreement, and claiming the benefit of the statute 2 & 3 Will. 4, c. 100. The defendant also stated, that since the making of the said agreement, and before the filing of the said bill, there had been more than three lawful rectors of the said parish, and more than sixty years had elapsed; and he submitted that on that ground also he was entitled to the benefit of the statute, and the said defendant claimed to be allowed the benefit thereof in like manner, as if he had pleaded the

the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to shew such payment or render of *modus* made or enjoyment had (as the case may be) not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing."

By section 2 it is enacted, "That every composition for tithes which hath been made or confirmed by the decree of any court of equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no *modus*, exemption, or discharge shall be deemed to be within the provisions of this act, unless such *modus*, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act."

And by the 3rd section it is enacted, "That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced."

same in bar to bar the bill. That, if the Court should be of opinion that the said lands were not, under the circumstances aforesaid, discharged of tithes, and that the said plaintiff was not bound by the said agreement, then the said defendant submitted that the agreement was one entire agreement, and must and ought to be altogether avoided and set aside, and that the lands and other privileges given to the rector of the said parish in exchange as aforesaid, and which were then held and enjoyed by the plaintiff, must be restored to the defendant, who, in that case, would be entitled to all the estate and interest which the said W. Plowden had therein previously to the exchange; and he insisted that the said plaintiff could not have any decree for an account of tithes against the other defendants to the said bill until he should have restored to him (the defendant Plowden) the lands and other privileges which were then held and enjoyed by the plaintiff as aforesaid, and had taken back the ancient glebe of the said rectory, which the defendant Plowden was willing and thereby submitted to give up, in case the said agreement was avoided, upon having the said lands and other privileges, then enjoyed by the said plaintiff as aforesaid, restored to him.

Both parties entered into evidence.

The plaintiff proved his presentation, institution, and induction;—that all the inhabitants of the parish, except the defendants in the present suit, compounded for their tithes with the plaintiff as rector; and he also proved several ancient tithers.

The defendants proved by several old witnesses their knowledge of the farms occupied by the defendants, and that they were the lands of the defendant Edmund Plowden, and formerly of his ancestor W. Plowden. That tithes had not, within their memory, been paid or received in respect of such farms and lands, and that the same were reputed to be free from tithes in consequence of an allot-

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ment of 140 acres of land to the rector, and an annuity of 40*l.* a year, and that the value of the 140 acres of land was 280*l.* a year. The defendants also proved various receipts for the annuity, one of them given by the plaintiff. The defendants likewise gave in evidence the decree of the Court of Chancery referred to in the answer, and a copy of the agreement of the 1st March, 1811; which latter document was proved to come out of the custody of the plaintiff, and the deeds securing the annuity of 40*l.* Various title-deeds of the Plowden family were given in evidence, and terriers and other documents were produced from the Bishop's registry. As the general effect of the evidence was not disputed, and corresponded with the case made by the answers, it is unnecessary to state it in detail.

Mr. Swanston, and *Mr. Griffith Richards*, for the plaintiff.—The arrangement set up by the defendants in this case is not merely voidable, but actually void, under the statute 13 Eliz. c. 10, s. 3 (a). And this point has

(a) "And that for long and unreasonable leases made by colleges, deans, and chapters, parsons, vicars, and others having spiritual promotions, be the chief causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors, incumbents in the same, be it enacted, by the authority aforesaid, that from henceforth all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other, having any spiritual or ecclesiasti-

cal living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapel, hospital, parsonage, vicarage, or other spiritual promotion, or anywise appertaining or belonging to the same or any of them, to any person or persons, bodies politic or corporate, other than for the term of one-and-twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved, and payable yearly during the said term, shall be utterly void and of none effect, to all intents, constructions, and pur-

been decided in *The Attorney-General v. Cholmondeley* (a). In that case an agreement had been made between the rector and inhabitants, by which certain lands were allotted to the rector in lieu of the glebe, together with a pecuniary stipend or compensation in lieu of tithes; and after a decree establishing the arrangement, and an acquiescence of eighty years, the arrangement was set aside at the instance of a succeeding incumbent. The great and principal objection to such an arrangement is, that no sufficient provision can be made for the increasing value of the tithes. In the present case the plaintiff, who was no party to the arrangement, is sought to be deprived of his legal right to tithes, and this is endeavoured to be effected by occupiers who are not proved to have any interest in the lands in question. If this transaction were supported, the effect would be wholly to defeat the disabling statutes. The present case cannot in principle be distinguished from *The Attorney-General v. Cholmondeley*.

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Mr. Boteler, and Mr. Bethell, for the defendants.—The plaintiff, by filing his bill for an account of tithes, necessarily seeks to open the agreement. He ought not however to be permitted thus indirectly to open the agreement partially. He ought, as in *The Attorney-General v. Cholmondeley*, to have applied to open the whole agreement, and to have an account taken of the tithes merely as incidental to the opening of the agreement. In *The Attorney-General v. Cholmondeley*, the plaintiff offered to give up the lands allotted to the rector in lieu of the glebe. In the present case no such offer is made by the plaintiff. The defendants contend that the agreement is one entire agreement, and that no partial relief can be given—that

poses, any law, custom, or usage to the contrary in anywise notwithstanding."

(a) 2 Ed. 304; 6 Bro. P. C. 332;

Amb. 510; 3 Barn. El. 7 edit. 439; Gwill. 914; 2 Eagle & Younge, 203.

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the agreement must be altogether avoided, or not at all—and that, in this question, the plaintiff is not alone concerned, but that the patron and the ordinary are likewise interested. The defendants undertake to prove that the arrangement not only was at the time when it was entered into, but is now, a beneficial arrangement for the rector. If it were not, the plaintiff is precluded, by the late statute, from setting it aside. He is now too late to file a bill for that purpose against the ordinary. In *Atterbury v. Turner*, and *Lord Nottingham v. Atterbury* (a), an agreement for an exchange of glebe lands between a former rector and lord of the manor was established, on the ground that it would be mischievous and of dangerous consequence to question such ancient exchanges, and throw open such ancient inclosures after so long an enjoyment on all sides, although it might not appear that the consent of the ordinary was at first had thereto; and a perpetual injunction was issued to the rector to stay all suits brought or to be brought touching any matter settled by the decree. In that case, therefore, the rector not only did not obtain a decree, but he was decreed to be bound by the arrangement. The defendants insist, that so long as the rector thinks fit to take the benefit of one part of the arrangement, he ought not to be permitted to repudiate the remainder of it. A strong distinction between this case and *The Attorney-General v. Cholmondeley* is, that in the latter case the incumbent sought to undo the whole arrangement, and offered to give up the land allotted in exchange for the glebe. The attention of the plaintiff was distinctly called to this point by the answers in the present suit, but the plaintiff has thought fit to proceed to a hearing without amending his bill. It may be collected from the case of *The Attorney-*

(a) 1 Eagle & Younge, 543.

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General v. Cholmondeley, as reported in Ambler, that the court below held that the agreement was not an entire agreement, and also that no compensation was allowed for the increasing value of the lands; for Lord *Northington* in his judgment states: "I have no reason to think that the lands allotted to the parson were for more than his glebe and tithes. It is the quality of the land and not the quantity which must determine the extent of the composition. In all the acts of Parliament which are made upon compositions with parsons, they are allowed a compensation for tithes upon improvements *in futuro*. Had a sum been paid by the defendants originally, by way of increase of tithes, they had stood on a different footing; for then they would have been purchasers for a valuable consideration by allowing for the future improvements. It would have suspended the equity of this Court by setting up equity against equity, and the parties would have been left to their remedy at law (a)." As no reasons are given for the judgment in the House of Lords, it is not unfair to presume that the judgment proceeded on similar grounds with these stated in the judgment of the Court below. There were distinct allotments in that case also in respect of the tithes and in respect of the glebe. In the present case the exchange is entire, and we have distinct evidence that the exchange is even now beneficial to the rector. The land allotted to him on the exchange has gone on progressively improving to the same extent as the glebe land, and it is inequitable that he should retain both. [*Alderson*, B.—Why is the landlord a necessary party to the suit?] He is interested, because the agreement which is thus indirectly sought to be set aside is one entire agreement. [*Alderson*, B.—Can the agreement be supported under Lord Tenterden's Act?] We contend that it is protected by the statute. It is true the plaintiff filed his bill against the defendants, the occupiers, before the ex-

(a) Ambl. 511.

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piration of the time limited by the act, but he did not make the defendant Plowden a party until after the expiration of that period. The defendant Plowden has taken the same objection by his answer which he raised by his plea, that he is not a defendant to any suit instituted within the time prescribed by the act; and that the agreement, so far as he is concerned, is therefore good and valid. If good and valid as to him it must be so as to the ordinary, who is not even now a party. Lord Abinger disposed of this question, on the argument of the plea, by holding that the tithes were the subject of the suit, and that proceedings had been instituted in sufficient time with reference to the subject of the suit. [*Alderson*, B.—There is only one suit, and it must be good as to all or none. The defendant Plowden is clearly a party to a suit instituted within the time limited by the act.] The suit would have been incomplete without him. [*Alderson*, B.—What decree can I possibly make against Mr. Plowden in this suit? He is not an occupier. How can I make any decree for tithes against him?] The rector having accepted the provision made for him under the arrangement, cannot have any relief in this suit. The rector is in possession of the land allotted to him, and has accepted the annuity with full knowledge of the facts, for the agreement is proved to have come out of his custody. By these acts he has, in effect, become a party to the arrangement, and is prevented from complaining of the transaction during his incumbency. He has elected to take under the agreement, and is debarred from setting it aside. The great object of the Court is to do complete equity, and to avoid multiplicity of suits. Where there would be cross actions at law, and one party comes into equity, the Court always imposes terms. Where a party seeks relief in respect of usury, that relief is only granted to him upon the terms of repaying the money actually

borrowed, and interest. So in *Kneble v. White* (a), it was held that a bill for an account of the rents and profits received by the grantee of an annuity in possession of the premises charged with the annuity, should contain an offer by the plaintiff either to redeem the annuity according to the provisions of the deed, or to repurchase it upon equitable terms to be settled by the Court. The Court is bound to give complete relief. The Legislature, in passing the statute 2 & 3 Will. 4, never contemplated or intended that a party should evade the question of the validity or invalidity of an agreement like the present by filing a bill simply for tithes. The virtually setting aside of the agreement by decreeing an account of the tithes, would be most inequitable in its operation, for the defendant would have no means of getting back the lands allotted to the rector in exchange, and the annuity or stipend, being secured by deeds, would still be payable. This is not such a suit as the statute intended to protect. The former decisions ought not, under the circumstances, to bind the Court in this case; but if bound by those decisions, still the Court will only assist the plaintiff on condition of his doing complete equity.

Mr. *Swanston*, in reply.—Any observations which might otherwise arise on the effect of Lord Tenterden's Act, are wholly removed by the remark, that transactions of the present description were clearly void before the passing of that statute, and are not, therefore, in any manner protected by the provisions contained in it. [*Alderson*, B.—The only real point is the question raised on the equity of the case.] The demand of the plaintiff is a legal demand, and a suit in equity is only necessary to assert the legal right, and the account is ancillary. No legal bar has been shewn to the legal right asserted by the plaintiff. Tithes

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(a) 2 Younge & Collyer, 15.

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may, of course, be the subject of equitable jurisdiction ; but a mere suit for tithes is the assertion of a legal right only. The legal right of the plaintiff in this case to tithes is not disputed. The only question in the suit is, whether the rector's legal right to tithes is barred, not whether there is any defence to his right. The equity asserted by the defendants is not an equity qualifying the rector's legal right, but a distinct equity opposed to his legal right. No case of election arises in the present case. Election necessarily implies an option. There is no evidence of any option having been given to the plaintiff. A portion of the evidence put in by the defendants consisted of receipts given by the plaintiff to Plowden for the annuity. These receipts are confined to only one year ; and the plaintiff, during the first year, was ignorant of his rights. There could be no election without a full knowledge on his part of his rights as rector. *The Attorney-General v. Cholmondeley* was an equitable suit, and not a mere suit for tithes, asserting only a legal right. It seems to have been the practice at one time to establish agreements of this description by decrees, which were perfectly useless, the agreements being absolutely void and incapable of confirmation. [Alderson, B.—The practice seems to have originated with *Edgerley v. Price* (a).] *Edgerley v. Price* is reported in a book of very questionable authority ; but it is proper to say, that in examining several of the cases in that book with Lord Nottingham's manuscripts, I have found it generally correct. *Edgerley v. Price* is not in Lord Nottingham's manuscripts. In *The Attorney-General v. Cholmondeley* there was no offer on the part of the plaintiff, as was supposed in the argument for the defendants in this case, to give up the land ; and the bill, in that case, was not a bill for tithes, but a bill to rescind the agreement, and the suit was therefore an application to the

(a) Finch, 18.

equity of the Court, and not the assertion in a court of equity of a legal right.

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At the close of the argument, *Alderson, B.*, said, that he should take time to consider the case, expressing a desire, if possible, to support an agreement which had been acted upon for so many years.

ALDERSON, B.—The bill in this case was filed for an account of tithes. The defence set up by the answer, in substance, is an arrangement entered into by all proper parties after the disabling statutes, by which certain lands were assigned over by the owner to the rector, and certain privileges were given to him, together with an annuity of 40*l.* a year; and in consideration of this the rector agreed, on behalf of himself and his successors, to exchange certain lands then forming the glebe of the rectory, and also to give up the tithes of the lands which the present plaintiff now claims. It does not very distinctly appear from the agreement whether the 40*l.* a year was assigned for the tithes and privileges, or for either of them, or for which in particular. In the view, however, which I take of the case, the point is not very material. The agreement appears to have been examined with great care by the then bishop, and he appears to have taken great pains to ascertain whether it was fair and reasonable. He certified that the arrangement was advantageous to the church, and at that time it probably was so. The bishop being thus satisfied, the agreement was subsequently confirmed by a decree of the Court of Chancery. The question now, therefore, to be considered, is, whether this agreement, so confirmed by the Court of Chancery, forms a sufficient defence to the demand in this suit.

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There is no question that such an agreement would now be valid under Lord Tenterden's Act, the provisions in which clearly apply to the present case.

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The real question is, whether this agreement, though confirmed by the decree of the Court of Chancery, was not absolutely void, and it appears to me that the case of the *Attorney-General v. Cholmondeley* decided this question. It seems impossible to understand how the Court of Chancery ever assumed to exercise jurisdiction to confirm such agreements, unless it did so upon what may be considered a metaphor rather than a rule, viz. that the church being considered as a minor, all those rules which applied to a minor, also applied to the church; and therefore that the Court had equal authority to give to the church the same protection which was afforded to a minor. The jurisdiction appears to me to have originated in some such notion as this, and it shews the danger of courts of justice acting on such grounds, for there are no disabling statutes applicable to minors. The case of *The Attorney-General v. Cholmondeley* brought back the rule to what seem to be proper and reasonable [grounds]. If agreements are made void by an act of Parliament, on the ground of public policy, it is for this reason—that, although some may be fair and honest, yet, as the majority of such agreements are notoriously unfair and dishonest, public policy requires that no such transactions should be allowed to stand. A small good must be sacrificed to prevent a great evil, which would necessarily arise but for such a provision, and the same public policy requires that the statute should be fully acted upon. I cannot understand how any court of justice could set itself up against the legislature and say, that that which the legislature had declared to be void, on the ground of public policy, the Court would confirm by its decree. *Atterbury v. Turner* appears to me to be a most singular decision; for though the precise point arose in that case, yet the Court, in the whole course of its judgment, never seems to have noticed the fact that the agreement had been made after the disabling statutes, but merely states that, under the circumstances, the Court would infer that

the agreement to exchange the glebe-lands had received the assent of the ordinary. In that point I entirely concur. There were quite sufficient circumstances from which the Court might reasonably infer, for the sake of supporting a long-established usage, that the consent of the ordinary and all other proper parties had been given. But the question is, would such consent have made the agreement valid? It seems to me that, though the Court gave extremely good reasons on the former part of the case, yet that the facts did not warrant the conclusion at which the Court ultimately arrived. I have been much pressed with an expression which is stated to have fallen from Lord *Northington*, in the case of *The Attorney-General v. Cholmondeley*, in which he seems to have said, that if provision had been made for the prospective increase in the value of the land, corresponding with the increasing value of the tithes, he should not have been inclined to interfere. This expression, if used by Lord *Northington*, does not seem to be quite consistent with the former part of his judgment, in which he observed, that the agreement was unequal, but that if it had been equal, it would have been void under the disabling statute. It appears to me that the latter part of his judgment is quite irreconcilable with the previous part, unless, indeed, it proceeded on the ground that the suit there was an application to the equitable jurisdiction of the Court, not only to decree an account of the tithes, but to set aside the agreement. And if Lord *Northington* had referred to this in the early part of his judgment, it would have removed the seeming inconsistency; for undoubtedly in that case it might reasonably have been said, that a Court of Equity would not interfere to set aside the agreement, though it would interfere to the extent of decreeing an account of the tithes. Whether this will explain the difference between the first part and the latter part of Lord *Northington's* judgment,

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I do not know. Certainly, though he considers the agreement in that case an unequal one, yet he does not decree that it shall be set aside, but simply directs that an account of the tithes shall be taken. That is what I shall do here.

This is not any application to the equitable judgment of the Court, except so far as an account is prayed of the tithes. The plaintiff rests his claim on his legal right. All that he claims from a court of equity is, that which arises out of his strict legal right—an account of the tithes, the legal right being established : and this account is for the purpose of preventing multiplicity of legal suits. Now, in this case, suppose I were to decide that I was not satisfied on the subject, the plaintiff would be entitled to an issue ; and if he is entitled to an issue upon his legal right, what am I to do if the jury to whom I refer the issue find that the legal right is in the plaintiff? In that case I must decree an account. If that be so—and if I am now satisfied that he has made out his legal right, does it not follow as of course that I must decree an account of the tithes to be taken? It is said the plaintiff ought to have given up the lands he holds; but how can he do this when he does not know whether the other party would give up the land conveyed to his predecessor? How is he to ascertain how much of this land was given for the tithes, and how much is to be referred to the exchanged lands? This is, besides, a suit against the tenants, and though the landlord is a party, I think he is not properly made a party to this record. It appears to me that the agreement is absolutely void; and that the plaintiff is therefore entitled to an account of the tithes as prayed, with costs. With respect to the defendant, the landlord, I see no ground upon which any decree can be made against him, and the bill must therefore be dismissed as against him. If he had been made a defendant originally, I should have ordered the bill to

be dismissed as against him with costs; but as he has been made a defendant by amendment, on the suggestion of the other defendants, who are his tenants, and therefore probably by his own desire, I think the bill ought to be dismissed against him without costs.

Decree accordingly.

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C 8. 135.
AN order having been made in this cause, referring it to the master to look into the interrogatories exhibited and the depositions made on the part of the defendants, and to report to the court whether the depositions contained any scandalous and impertinent matter, the master reported in the affirmative, specifying the passages which he considered scandalous and impertinent. These passages occurred in the evidence of the defendants' attorney, who was examined as one of their witnesses, in reply to the last interrogatory.

The master having reported certain passages in the depositions taken for the defendants to be scandalous and impertinent, but having made no report as to the frame of the interrogatories:—*Held*, that the defendants were not liable to the costs of the reference, &c.

Mr. Blenman now moved that the master's report might be confirmed, and that it might be referred back to him to expunge the scandalous and impertinent matter, and to tax the plaintiff's costs of the reference, and of this application, &c.

Mr. Teed, for the defendants, said, that as there was no complaint of the frame of the interrogatories, but only of the depositions, the defendants ought not to be made to pay the costs now asked for. The defendants could not control the conduct either of the examiner or of the witness, who were the only parties to blame. In *Cocks v. Worthington (a)*, and *Anon. (b)*, no costs were given.

(a) 2 Atk. 235.

(b) 2 P. W. 405.

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Mr. *Blenman* in reply contended, that as the scandal was the production of the defendants' own attorney, it was reasonable that the defendants should pay these costs.

The LORD CHIEF BARON.—If the master had reported both the interrogatories and the depositions to be scandalous and impertinent, I should have allowed you the costs you ask for. But as the report extends only to the depositions, I am of opinion that you are not entitled to these costs. If you had made your motion specifically against the attorney, it might have been a good reason for making *him* pay the costs.

Order as prayed, except as to costs.

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The attorney for the defendants having been examined as their witness, and having made certain scandalous and impertinent statements in his deposition in reply to the last interrogatory, was compelled to pay the costs of expunging such scandalous and impertinent matter.

Seemle, that the examiner is not liable for the costs of expunging scandalous and impertinent matter from

The scandalous and impertinent matter contained in the depositions before mentioned having been expunged, a motion was now made that the costs mentioned on the former occasion, together with the additional costs incurred by the plaintiff relative to the same matter, might be paid by Mr. Fox, the solicitor for the defendants, or by A. B., Esq., the examiner who examined Mr. Fox.

Mr. *Blenman* for the motion cited *Ex parte Simpson* (a), and *Ex parte Wake* (b), to shew that the court would, in its discretion, fix the solicitor with these costs; but, supposing there were any doubt upon that point, he contended that the examiner was liable, on the authority of *Anon.* (c). There, as here, the witness was examined to the last interrogatory, and yet the commissioner was held to be in fault for allowing an irrelevant answer.

depositions made in answer to specific interrogatories, nor from depositions made in answer to the last interrogatory, where the deposing witness is an attorney in the cause.

(a) 15 Ves. 476.

(b) 3 D. & Chit. 246.

(c) 2 P. W. 405.

Mr. Teed, for the solicitor.—If the solicitor is to be fixed with costs, he ought to have been a party to the inquiry as to the scandal. [The Lord Chief Baron.—He was employed as solicitor at the reference.] The correctness of the report is questionable. The solicitor had no opportunity of excepting to the report. In order to except, he ought to have been distinctly and separately before the court. In this court a report of scandal and impertinence must be confirmed. If upon the motion to confirm the report, and to expunge, an application had been to visit these parties with costs, they might have taken the opinion of the court as to the scandal. [The Lord Chief Baron.—You think the admission of the scandal by the client does not bind the solicitor?] Unquestionably not. If the witness had not been the defendants' solicitor, these proceedings could not have been taken in his absence, and his situation as solicitor can make no difference. The plaintiffs have put the record in such a state that they cannot now be heard. [The Lord Chief Baron.—I agree with you to this extent—that if this person had not been a solicitor, and was not a party to the suit, he would have had a right to resist the payment of these costs, unless he had had an opportunity of shewing that he ought not to be made liable. I never doubted that; but whether a solicitor in the cause is not so much a party to the proceedings as to be identified with his client, I have doubted from the first.]

Mr. G. Richards, for the examiner, contended that his client had no control over the manner in which the interrogatories were framed, and consequently was not responsible for the answers which might be given to them. [The Lord Chief Baron.—The commissioner has no control over interrogatories prepared by counsel. He has nothing to do with their being impertinent; his sole duty being to put them to the witness. The only doubt is, whether he

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is to be supposed to be so far acquainted with the facts in the cause as to be responsible for evidence received in answer to the last interrogatory. I think he ought not in a case where the evidence is given by an attorney in the cause.]

Mr. *Blenman*, in reply, observed, that the attorney was an officer of the court, and in that light, independently of being identified with a party in the cause, might be visited with these costs.

The LORD CHIEF BARON.—I think that the costs of the reference, and of expunging the irrelevant matter, should be paid by Fox, but that the examiner ought to have his costs of appearing, and that these costs should be paid by the plaintiff. It must be an extreme case, indeed, which should induce the court to visit the examiner with costs; but in the case of an attorney in the cause, the court will not shew so much indulgence.

Order accordingly.

Feb. 10th,
 13th.

Testator devised to J. M. for his life "one annuity or clear yearly sum of 100*l*," and charged his estates at C. with the payment of the annuity. He then devised the estates at C. to trustees, in trust to levy and raise the annuity and pay the same to J. M.; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A. for life, with remainder to B. in fee:—*Held*, that J. M. was entitled to the annuity clear of all deductions for legacy duty.

Henry John Attfield by his will, after directing that all his just debts, funeral and testamentary expenses should be paid and satisfied by his trustees and executors therein after named, out of the rents and profits of his real estates thereafter devised to, or in trust for, his friend and relation, Richard Gude the elder, for his life, with remainder to his son, Richard Gude, in fee; and after giving several small pecuniary legacies, all which legacies he directed

The question whether a legatee is to take his legacy free from legacy duty, depends upon the intention of the testator as manifested upon the face of the will. Therefore, the words "without deduction," "clear of all deductions," &c., may be sufficient to free the legacy from duty, although there be, from the nature of the property on which it is charged, other outgoings to which these words may be applied.

should be paid and satisfied by his said trustees and executors out of the rents and profits of his real estates as before mentioned, gave, devised, and bequeathed in the words following; that is to say, "I give and bequeath all and singular my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, unto my friend, James Metherell, his executors, administrators, and assigns, for his absolute use and benefit. I give and devise unto the said James Metherell, and his heirs, all that messuage or tenement wherein I now dwell, with the garden and pleasure ground thereto belonging, situate in the said parish of Chobham, to hold the same with the appurtenances unto and to the use of the said James Metherell, his heirs and assigns for ever. I also give and devise unto the said James Metherell *one annuity or clear yearly sum of 100*l.** for and during the term of his natural life, such annuity to be paid by equal half-yearly payments, the first half-yearly payment thereof to commence and be made at the end of six calendar months from the time of my decease; and I do hereby charge all the residue of my freehold messuages, lands, tenements, and hereditaments, situate in the said parish of Chobham, with the payment of *the said annuity or yearly sum of 100*l.**; and subject thereto, and charged and chargeable with the payment of my said debts, funeral and testamentary expenses, and the several legacies hereinbefore by me given and bequeathed, I give and devise all the rest, residue, and remainder of my messuages, lands, tenements, and hereditaments, situate in the said parish of Chobham, and all other my real estates whatsoever and wheresoever, with their and every of their appurtenances not hereinbefore devised, unto and to the use of Samuel Mumford the younger and William Soan, their heirs and assigns, in trust by such ways and means as they or the survivor of them, his heirs or assigns, shall think fit, to levy and raise the said annuity hereinbefore given to the said James

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Metherell, and to pay the said annuity when so raised unto the said James Metherell, according to the trusts of this my will; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for my said friend and relation, Richard Gude the elder, of New Bridge Street, in the city of London, gentleman, and his assigns, for and during the term of his natural life; and from and immediately after his decease, then in trust for Richard Gude the younger (the second son of the said Richard Gude the elder), his heirs and assigns for ever. And lastly I hereby nominate, constitute, and appoint the said Samuel Mumford and William Soan executors of this my will."

The testator by a codicil directed that all his debts, legacies, and funeral expenses by his said will directed to be charged on his real estate devised in trust for the plaintiff, Richard Gude the elder, for his life, should be charged thereon exclusively, and in exoneration of his personal estate. And he directed that if James Metherell should die on any other day than one of the half-yearly days of payment of the annuity, a proportionate part thereof should be paid to his executors, administrators, or assigns, up to the day of his death.

The testator died in August, 1829, and soon afterwards the plaintiff, Richard Gude the elder, entered into possession of the devised estates. He regularly paid the annuity, treating it as an annuity the duty upon which was to be paid by the annuitant, until the year 1832, when Metherell claimed to have the legacy duty paid out of the estate on which it was charged. In consequence of this claim the plaintiff for some time paid the duty under protest, but now brought his bill, praying that it might be declared that the legacy duty payable in respect of the annuity was not charged upon the devised estates; that if necessary an account might be taken of what was due in respect of the annuity, and that the plaintiff might have

credit in such account for the sums which he had paid for legacy duty.

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Mr. *Simpkinson* and Mr. *Blenman*, for the plaintiff.—The testator gives to *Metherell* “one annuity or clear yearly sum of 100*l*.” for the term of his life. The words “annuity” and “clear yearly sum” are used here as synonymous; and to shew more clearly that that was the testator’s meaning, he subsequently omits the word “clear,” and calls the annuity a “yearly sum.” He charges all the residue of his lands in *Chobham* with the payment of the said annuity or yearly sum; and subject thereto, that is, to the annuity or yearly sum, he gives the residue of his real estates in trust for the plaintiffs. So far there is clearly nothing to lead to the conclusion that the legacy duty for this annuity was chargeable on these premises; but then the trustees are to take the premises in trust to levy and raise the annuity, and to pay the annuity when so raised to *Metherell*; “and subject thereto, and all costs, charges, and expenses attending the raising and paying the same,” in trust for the plaintiff. Now, is it possible to contend that these words, merely affecting the devise to *Gude*, and referring exclusively to the costs to be paid in raising and paying the annuity, are to be applied so as to indicate an intention that the legacy duty should be paid out of these premises? The cases in which a construction has been put upon the words “without deduction” differ materially from the present case. *Barksdale v. Gilliat* (a) was the case of a legacy merely payable out of personal estate; and Lord *Eldon* doubted whether a qualified construction could not be put upon the words “without deduction,” so as still to charge the legatee with the duty. [*Alderson*, B.—It is remarkable that Lord *Eldon* should have doubted; because the words of

(a) 1 Swanst. 562.

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the Legacy Act are that the executor shall deduct.] In *Courtoy v. Vincent* (a), the words which were held to exonerate the legatees from payment of the legacy duty were much stronger than any words contained in this will. The testator there directed that the legacies and annuities should be paid "clear of the property tax and all expenses attending the same." The present case must be governed by that of *Hales v. Freeman* (b). There an annuity charged upon real estate was given clear of all deductions. The trustees paid the legacy duty, and afterwards the annuitant assigned the annuity. The trustees then brought their action against the annuitant to recover the amount of the legacy duty; and the Court held that the action lay, and there was judgment for the plaintiff. It is remarkable that in that case no observation was made upon the construction of the will, which shews that the point as to the legacy duty was considered untenable. [Alderson, B.—That case is at variance with the case before Lord Eldon. No distinction can be made between the words "clear of all deduction," and "without deduction."] The case of *Hales v. Freeman* is not inconsistent with the principle on which Lord Eldon's judgment proceeded. In *Smith v. Anderson* (c), Sir John Leach in speaking of that judgment said, that Lord Eldon considered that a direction to pay annuities without deduction would not extend to exempt the annuitant from the legacy duty, if, from the nature of the property out of which the annuities were payable, there was any other deduction to which the annuities might be subject. The case of *Dawkins v. Tatham* (d) was decided on that principle, for there could be no deduction in that case except for legacy duty; the annuity being payable out of dividends of stock. In *Gosden v. Dotterill* (e), the legacy was to be paid out of the per-

(a) Turn. & Russ. 433.

(b) 1 Brod. & Bing. 391.

(c) 4 Russ. 354.

(d) 2 Sim. 492.

(e) 1 M. & K. 56.

sonal estate free from all expense; and the Court held, that legacy duty was the only expense to which those words could apply. In *Louch v. Peters* (a), and *Snow v. Davenport* (b), the decisions depended on the words "free of all taxes and other outgoings," which are much stronger than any words contained in this will.

The cases therefore, upon the whole, proceed upon the principle, that where there are no outgoings, or deductions, or charges to which the legacy or the annuity could be subject to, except the legacy duty, and the testator gives either a legacy or an annuity clear of all deductions, he must mean the only thing to which it was subject; but if there are other charges which would satisfy the words of the will, the legatee will be liable to duty. Here there are other charges which will satisfy the words of the will; but independently of that it is clear that the testator only meant the expenses of raising the annuity. The trustees are to pay the annuity to Metherell for his life, and then the property is given subject to the annuity, and all costs, charges, and expenses attending the raising and paying the same. That means the costs, strictly, and not the legacy duty; which has nothing to do with the costs, which is a tax imposed by law, and which the annuitant is liable to pay unless there is a clear contrary intention on the face of the will. Even in cases where the rational inference is the other way, it has been held, that unless there is a clear declaration to the contrary, the legacy must be charged against the legatee: *Foster v. Ley* (c). [*Alderson*, B.—In that case the legacy duty was never present to the mind of the testatrix.]

Mr. *Swanston* and Mr. *Teed*, for the defendant Metherell.—The only case which has been cited in which it was adjudged that the legatee was to pay the duty, is the

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(a) 1 M. & K. 489.

(b) 5 B. & Ad. 359.

(c) 2 Bing. N. C. 269; 2 Scott, 438.

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case before the Court of Common Pleas, where the point now in issue did not distinctly arise, and was not adjudicated upon. In *Barksdale v. Gilliat* the words were, "without any deduction," and then follows a passage on which the argument chiefly turned—namely, "A list of all my property at this time is left with this will, &c.;" which referred to a document enclosed in the will shewing that the testator could not have intended the duty to be paid out of the residue. Lord *Eldon's* doubt does not arise from thinking the expression in the will insufficient to exempt the legatee, but because there was a suspicion in his mind that the testator did not intend that the legatee should be exempted. Sir John *Leach*, in commenting on the case of *Barksdale v. Gilliat*, gave his judgment upon a total misapprehension of it. What he stated to be the result of Lord *Eldon's* judgment had, in truth, nothing to do with it. Lord *Eldon's* decision did not proceed on the ground that the word deduction might be referred to other charges, but that it was absurd to say that a legatee should take subject to deduction, the testator expressly saying that he should not. Upon that view of *Barksdale v. Gilliat*, if the case rested in this instance on the first words of the will creating the annuity, the annuitant would be entitled to take it clear of duty. But then it is said, that by the words "clear yearly sum," the testator meant annuity. Doubtful words in a will are to be construed by words not susceptible of doubt. If the word "annuity" were out of the question, the defendants' case would be governed by that of *Barksdale v. Gilliat*. Is he to be without the benefit of the word "clear" because the testator combines with it another word not importing so much?

But the case does not rest there, because the testator in a subsequent part of his will charges "all costs, charges, and expenses attending the raising and paying the annuity" upon the real estate upon which the annuity is charged. Now, the plaintiff must say either that the

legacy duty is not a charge, or that because there are some other charges the annuitant is not exempt from this. But here there is an express direction, that *all* costs, charges, and expenses are to be paid out of the estate. How then is this case distinguishable from *Courtoy v. Vincent*, where the "expenses" were precisely the same as in the present case? That case was, in truth, less favourable to the legatee than the present, because there the word "expenses" was alone held sufficient to comprehend legacy duty. Here the word "charges" would at all events include the legacy duty.

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Mr. G. Richards and Mr. J. Russell for the trustees.

Mr. Simpkinson in reply.

ALDERSON, B.—It is clear that the principles upon which questions as to the payment of legacy duty proceed, are those which govern the construction of wills. In order to arrive at the decision that a legacy is to be paid free of duty, the Court must be satisfied that the intention of the testator in that respect has been clearly made out. *Prima facie* the law must take its ordinary course, and the legacy must be left in the circumstances in which the law places it; nevertheless it is competent for the testator, by words, to direct otherwise. The case in the Common Pleas (a) was a case of disposition by a testatrix, in which no direction of that sort was contained in the will. There the testatrix, by her will, directed that her husband's debts should be paid. She probably had no notion that she was leaving legacies to the amount of those debts. The law, however, says, that bequests so made shall be subject to legacy duty, and her will being silent upon that point, it was held that the creditors took these legacies

Feb. 13th.

(a) *Foster v. Ley*, 2 Bing. N. C. 269.

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 }
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 v.
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subject to the duty. This construction probably violated the intention of the testatrix, but the Court considered itself bound by the terms of the will.

But from the other cases, particularly that of *Barksdale v. Gilliat*, it is clear, that if you can collect from any direction contained in the will that the testatrix's intention was that the legacy duty should be paid by the executor, the Court will carry that direction into effect. In *Barksdale v. Gilliat*, the direction was, that the legacy should be paid "without *any* deduction." Lord *Eldon*, in his judgment, does not follow the words of the will, but takes them as if they were "without deduction" only. That circumstance alone shews that the view taken of Lord *Eldon's* judgment by Sir *John Leach* was not correct. If it had been correct, the word omitted would have been material, and Lord *Eldon's* language would have been altogether different; but in the view which he took of the case it was not material. Lord *Eldon* evidently considered that the words "without deduction" in their ordinary sense mean "clear of all deduction." He then went on to examine whether, in the four corners of the will, he could find the same words used in another sense, or in a more definite and limited sense; and whether, if he could find an intention to use them in a limited sense, he could carry that intention into effect; and, upon the whole, he arrived at the conclusion, that the words must be used in their ordinary sense without qualification. That appears to me to be the right construction of Lord *Eldon's* judgment, and I am confirmed in that opinion by the observations of Lord *Brougham* in *Louch v. Peters* (a).

With the exception of Sir *John Leach's* dictum, the authorities upon this subject are all one way. That being so, the question in this case is, whether I can find words in this will shewing that the testator used the ex-

(a) 1 M. & K. 499.

pression, which he has used, in a limited sense. The words of the will are "one annuity or clear yearly sum," and the argument is that the word "annuity" is equivalent to "clear yearly sum;" but if it be so, which is to govern? Is it the word "annuity?" It appears to me, that any ambiguity that there is in this expression is to be explained by the word "clear," and that the words "one annuity or clear yearly sum" are equivalent to the words "one clear annuity;" the word "clear" meaning "clear of all deductions." It is true that, in another part of the will, the testator uses the expression "the said annuity or yearly sum," without using the word "clear;" but that expression is coupled with words of reference, the testator evidently referring to the annuity which he had already bequeathed. The latter part of the will puts the question out of doubt. The trustees who hold the land out of which the annuity is to be raised, are to deduct the costs, charges, and expences attending the raising and paying it, out of the profits of the land. The legacy duty is a charge of expence attending the raising and paying this annuity.

Upon the whole it appears to me, that, upon the point in issue, there is only one conclusion to be drawn from this will, namely, that the residuary estate is chargeable with the duty payable for this annuity.

Decree accordingly.

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C. 18. PAYNE, v. COMPTON—COMPTON v. PAYNE.

Jan. 27th.

IT appeared from the statements in the bill and cross bill, that in the month of April, 1820, Payne, being seised

The bill alleged that the plaintiff A. had sold Blackacre to B.,

upon an agreement that B. should execute to him a mortgage both of Blackacre and Whiteacre; that the mortgage was accordingly made, and that B. afterwards mortgaged Blackacre to C. The bill then, after alleging that B. had conveyed Whiteacre to a purchaser for valuable consideration without notice of the mortgage, prayed a foreclosure of Blackacre:—*Held*, that the purchaser of Whiteacre was a necessary party to the suit.

Semble, that purchase for a valuable consideration without notice is available as a defence against a plaintiff who relies on a legal title.

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in fee simple of an estate at Warminster, entered into an agreement with a person of the name of Tring to sell him that property. The arrangement was, that Tring should not pay any money, but, upon that estate being conveyed to him, should execute a mortgage of it, and also of another estate to which he was entitled, called the Courton estate, to Payne. In June, 1820, Payne executed deeds of lease, release, and feoffment, by which he conveyed the Warminster property to Tring, and at the same time Payne placed in the hands of Tring all those deeds. Afterwards, upon the execution of the mortgage to Payne, Tring delivered over to Payne the indentures of lease and release of the Warminster estates, but kept in his possession the indenture of feoffment. Tring afterwards applied to Compton for a loan of money on the Warminster estate, and upon that occasion produced to Compton the indenture of feoffment. Compton, accordingly, under the belief that Tring was the real owner of the property without incumbrance, advanced the money.

The original bill, which was filed against the assignees under the bankruptcy of Tring, and against Compton, prayed for a foreclosure of the Warminster estate; alleging, with respect to the Courton estate, that Tring had conveyed it to a purchaser for a valuable consideration without notice of the mortgage created upon it. The cross bill was filed by Compton for the purpose of establishing his priority over Payne.

Mr. *Simpkinson* having opened the case for the plaintiff in the original suit,

Mr. *G. Richards* and Mr. *J. Parker*, for the defendant Compton, objected that the alleged purchaser of the Courton estate ought to have been made a party to the bill. And they contended, that Payne having executed a double conveyance of the Warminster estate, and placed the

indenture of feoffment in the hands of Tring, thereby enabling him to commit a fraud, Compton's mortgage on the Warminster estate had the priority to Payne's, and that, as against Compton, Payne was not entitled to a foreclosure. That being so, Compton would have a right to redeem Payne, not only as to the Warminster estate, but the Courton estate. He would have a right, under the circumstances, to stand precisely in the same situation, as to both estates, as the first mortgagee. If so, it is necessary to have the alleged purchaser of the Courton estate before the court, in order that he may see that the account is duly taken between Payne and Compton: *Palk v. Lord Clinton* (a), *Stokes v. Clendon* (b). If he were not a party, Compton might be put to the necessity of filing a bill against him to foreclose the Courton estate. It is stated in the bill that the Courton property was sold for a valuable consideration without notice. The answer to that is, that whether the purchaser had notice or not is wholly immaterial. If, as appears by the bill, the legal estate in that property was conveyed to Payne, of course Tring had no longer power to deal with it, and the question of notice can never arise unless the purchaser has the legal estate. Tring had no property in it whatever, except the equity of redemption; it is, therefore, perfectly clear that the purchaser, or alleged purchaser of the Courton estate took it liable to the mortgage of Payne. Besides, if he were a purchaser for a valuable consideration without notice, the mere allegation of that fact is not sufficient: it must be proved.

Mr. *Simpkinson* and Mr. *Stinton*, for the plaintiff.—Compton, in his answer, makes a totally different defence from that made at the bar. The case made by the answer is, not that he is entitled to redeem in the manner stated,

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(a) 12 Ves. 48.

(b) 3 Swanst. 150.

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or that the purchaser of the Courton estate is a necessary party, but only that he, Compton, under the circumstances stated in the answer, is entitled to priority over Payne. That is his whole case. The objection for want of parties is not attempted to be made: nor is it made in the cross-bill which Compton filed against Payne. By that bill he insists that he is entitled to priority over Payne, and in case the court shall be of opinion that he is not entitled to priority, then he prays to be at liberty to redeem; and singularly enough, in that suit he has not made the owner of the Courton estate a party. It is for the court to say, upon a record so constituted, whether the objection, if good under other circumstances, can possibly prevail in this case. It is stated that Tring fraudulently represented himself to be the owner of the fee of the Courton estate, and sold it to a purchaser for valuable consideration without notice of the mortgage: if so, a court of equity cannot under such circumstances interfere against the purchaser. It has been contended, that the owner of the Courton estate is a necessary party to the suit, because he is interested in the account to be taken between Payne and Compton; the latter being entitled to stand in the place of Payne, as against both estates. Without denying the truth of that proposition as a general proposition, does it follow that the person who purchased the Courton estate in the manner stated in the pleadings is a necessary party to the suit? What relief can be asked against him? He purchased the fee, and it must be assumed that he had a conveyance for a valuable consideration without notice. Is it so clear that any relief can be had against a purchaser under such circumstances? It is true that in *Collins v. Archer* (a), Sir John Leach held, that a purchaser for a valuable consideration without notice had no defence against a plaintiff relying upon a

(a) 1 Russ. & Myln. 284.

legal title. But Sir Edward Sugden does not appear to consider that case as a decisive authority (a). He says that the title of a purchaser for a valuable consideration without notice is a shield to defend possession, and not a sword to attack the possession of others; that it is clear that it protects possession from an equitable title, but whether it avails against a legal title was perhaps doubtful, though in the last decision upon the subject, that of *Collins v. Archer*, the Master of the Rolls, Sir J. Leach, followed the precedent in *Williams v. Lambe* (b).

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The LORD CHIEF BARON.—I cannot but think that the alleged purchaser of the Courton estate is a necessary party to this suit. If he were a purchaser for a valuable consideration without notice, that would protect him against any claim by the owner of the legal estate. But Compton, if he redeemed Payne's mortgage, was not bound to take Payne's statement in the bill as to the Courton estate being purchased for a valuable consideration without notice. That fact is not admitted in the answer, and therefore I cannot take it as a fact conceded. That fact must some way or other be established before Compton can be considered as precluded from calling on that person to be a party to this suit. I must look at it in the same way as if a party had a mortgage upon two estates, which became separated in different hands. The plaintiff has filed a bill to foreclose on one estate only. It would be very hard if the purchaser of that one estate were compelled to pay the whole mortgage: the party must go to the purchaser of the other estate, and make him pay a portion, or give him the title to the whole. It appears to me that the objection for want of parties is one, without getting rid of which, I cannot make a final end of the controversy. The case must therefore stand over, with liberty for the parties in both causes to amend.

(a) Sug. V. & P. chap. xviii.

(b) 3 Bro. C. C. 264.

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MEMORANDA.

IN February 1837, *Thomas Coltman*, Esq., one of His Majesty's counsel, was called to the degree of the coif, and gave rings with the motto "*Jus suum cuique*," and was thereupon appointed one of the judges of the Court of Common Pleas in the room of Mr. Justice *Gaselee*, who had resigned that office, and shortly afterwards received the honour of knighthood.

About the same time, the following gentlemen were appointed His Majesty's counsel learned in the law, namely, *Francis Newman Rogers*, of the Inner Temple, Esq.; *Biggs Andrews*, of the Middle Temple, Esq.; *George Chilton* and *John Evans*, of the Inner Temple, Esqs., and *Richard Budden Crowder*, of Lincoln's Inn, Esq.

Feb. 8th, 15th.

DOWBIGGEN v. BOURNE.

THIS cause now came on for hearing upon the answers and evidence. The facts, as stated in the bill, and as reported in 1 *Younge*, 111, were not disputed; but the point of law which on the former occasion was raised by demurrer, was now re-argued.

Mr. *James Russell*, for the plaintiff.—The point reserved for argument on the present occasion was virtually decided in the plaintiff's favour by Lord Chief Baron *Alexander*, when he overruled the demurrer. The question is, whether the plaintiff, who is the personal representative of John Dowbiggen, has an equity to have the judgment obtained against Cawthorne assigned to her.

Upon a bill filed by the administratrix of B., for the purpose of obtaining an assignment of the judgment which had been recovered against A., the principal debtor:—*Held*, that such judgment not being available at law in the hands of the creditor, was not available in equity in the hands of the surety, and consequently that the Court could not compel an assignment, as sought by the bill.

Amittage A., and B.,
as his surety,
Baldwin
5 Nov. 1838
a joint and
several promis-
sory note to
C., the latter
brought separate
actions against
A. and B. upon
the note, and
recovered judg-
ment in both
actions; C.
afterwards is-
sued execution
upon the judg-
ment obtained
against B.,
whereby B. was
compelled to
pay the whole
debt and costs.

Int see
C.P. *Cooper*'s
complaint
of this decision
C.P.C. *Refd*
645

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The law upon that point is settled by some ancient and many modern decisions. The case of *Parsons v. Prid-dock* (a), which is an old authority, has been recognised and approved of by modern Judges, though going much farther than the present case. In that case there was no privity between the sureties and the bail; but an action having been brought against the principal debtor, and bail being given, and in that action judgment having been obtained against the bail, but not enforced to execution, the creditor availed himself of the bond given by the sureties, and the Court gave the sureties the benefit of the judgment against the bail, saying that the bail should be considered as the principal, and that having paid the creditor they should have the judgment assigned to them. And yet it is clear that if the creditor had obtained payment, and had endeavoured to enforce payment again, the proceedings would have been stayed. The general principle is laid down in *Wright v. Morley* (b), where Sir William Grant says, that as the creditor is entitled to the benefit of all the securities which the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor. The decision of Lord Eldon, in *Copis v. Middleton* (c), is not inconsistent with this principle, though his Lordship qualified the right of the surety in certain cases. It was there held that if A. as principal, and B. as surety, are jointly bound in a bond, and B. pays the bond, the instrument is extinguished by that payment; and the surety, though he has a claim against the principal debtor for the money paid, has nevertheless no claim as a specialty creditor. In *Hodgson v. Shaw* (d), Sir John Leach likewise decided that the surety in a bond who had paid off the debt could not stand in the situation of a specialty creditor of the

(a) 2 Vern. 608.

(b) 11 Ves. 22.

(c) Turn. & Russ. 224.

(d) 3 M. & K. 183.

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principal debtor. But upon appeal Lord *Brougham* reversed Sir *John Leach's* decision, upon a distinction which was not taken before His Honor, but which is quite consistent with former decisions. In that case one *Whaley* was surety in a bond given by *Shaw* for securing a sum of money and interest due from *Shaw* under a former bond. *Whaley*, and after his decease his executors, made various payments on account of what was due under the second bond, till the whole was discharged. The executors then procured an assignment of the original bond in trust for their benefit, and claimed to be specialty creditors against the estate of *Shaw*; and Lord *Brougham* held that the executors were entitled to all the existing securities which the creditor had against the principal debtor; that though the second bond was satisfied and gone, there still remained a bond in which *Shaw* was the sole obligor, and that by virtue of that bond they were entitled to stand as specialty creditors against his estate. His Lordship's judgment proceeded on the rule of equity as stated by Sir *S. Romilly*—namely, that “a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment.” The case of *Hudson v. Stalwood* (a) is an authority to shew that this rule is regarded even at law. [*Alderson*, B.—I do not understand the doctrine of that case, notwithstanding the high authority of Lord *Hardwicke*.] Here the judgment against the principal debtor remains unsatisfied, and the plaintiff claims to have the security assigned to her to make it available against the estate of *Cawthorne*. [*Alderson*, B.—Suppose there had been only one action and judgment—you could have had no equity; so that the equity you claim depends on the form of the proceedings at law, there being two actions.] If there had been only one action, there would cer-

(a) Ca. Temp. Hardw. 153.

tainly have been nothing for equity to operate upon; but there being two actions, and judgment in one of them remaining unsatisfied, I have a right to the benefit of that judgment. Suppose I brought *scire facias* on that judgment; Cawthorne could not defend himself except under the statute of Anne (a). What equitable foundation would there be in such a case for any court to interpose against my right to sue? The unsatisfied judgment being made available for the surety, would be no reason for a Court of equity to stop my legal right, but on the contrary, it would be a ground for allowing the surety the full benefit of the judgment. If A. grants an annuity, and enters into a bond as a security for the payment of the annuity, and B. enters into a separate bond as surety, it is unquestionable that the principal creditor, being paid the amount of one bond, cannot sue on the other, and the surety has a right to the unsatisfied bond. Suppose, instead of two bonds, two warrants of attorney are given in the same manner; what becomes of the doctrine of principal and surety, if, when by means of the judgment entered up against me the creditor has obtained payment of his whole demand, I cannot have the benefit of the judgment which he may have entered up on the other warrant of attorney?—He then referred to *Butcher v. Churchill* (b), and *Sharpe v. Earl of Scarborough* (c).

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Mr. *Simpkinson* and Mr. *G. Richards* for the defendant Mrs. Cawthorne, the personal representative of Cawthorne.—The questions are, first, whether, under the particular circumstances of the case, the plaintiff is entitled to the assignment of this judgment; and, secondly, if so entitled, whether it can be made available at law. It has been stated that the point was adjudicated by Lord Chief Baron *Alexander*. There are, indeed, several propositions in

(a) Stat. 4 Ann. c. 16.

(b) 14 Ves. 567.

(c) 3 Ves. 557.

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his lordship's judgment which may be deemed questionable, but he took great pains to say that he would not decide the point now before the Court. Why he did not decide it, it is difficult to say. The defendant admitted, as he does now, all the facts, but disputed the law. His lordship, however, for some reason which does not appear, considered that he could not decide the point of law. The question is, not whether the plaintiff is a creditor of Cawthorne; for that is admitted: but whether, under the circumstances, she is entitled to the assignment of the judgment against him. The two judgments were obtained at different times. That against the principal having failed, by reason of his insolvency, another judgment was obtained against the surety, under which execution issued, and the debt was satisfied. But it has been expressly decided, that if collateral securities are given for a debt at a different time from that when the debt was contracted, the surety paying the debt is not entitled to avail himself of the collateral securities: *Wade v. Coope* (a). So, in the case before Lord *Eldon*, he treats the collateral securities as given at the same time; and hence it would follow from these authorities, that even if this judgment were available at law, the plaintiff would not be entitled to an assignment of it for her benefit.

But supposing the plaintiff entitled to the assignment, could it be made available at law? Would not a court of law hold it to be satisfied, and would not a court of equity, therefore, stultify itself in ordering an assignment? In *Gammon v. Stone* (b), the surety of a bond went to the obligee, and offered to pay the money if the obligee would assign; but the obligee refusing so to do, the Court would not compel an assignment. In *Woffington v. Sparks* (c), a case of a similar nature, Sir *Thomas Clark*, in com-

(a) 2 Sim. 155.

(b) 1 Ves. sen. 339.

(c) 2 Ves. sen. 569.

menting upon the case of *Gammon v. Stone*, said, that the Lord Chancellor in that case held that the assignment was not to be insisted upon, because it was a useless thing; the bond when once satisfied being *functus officio*. The case of *Copis v. Middleton* (a) is a strong authority for the defendant. That was not the case of a bill filed for the purpose of obtaining an assignment, but of a surety insisting that, having paid the bond, he was entitled to rank as a specialty creditor. It is clear that, if he could have enforced an assignment of the bond, he would have been a specialty creditor, but Lord *Eldon* held that he was only a simple-contract creditor. The case of *Copis v. Middleton* has been acted upon ever since, though some learned judges have doubted whether it was not carried too far. In *Ongé v. Truelock* (b), the surety in a bond had paid the whole debt with interest. Upon a bill filed by him against his co-sureties for contribution, one question was, whether the plaintiff was entitled to any interest as against his co-obligors. Lord *Plunkett* held that, though entitled to contribution on the sum actually paid, he was not entitled to interest in the absence of express contract. Now it is clear that he would have been entitled to interest if he were entitled to have an assignment of the bond. In *Jones v. Davids* (c), a person joined a testator as surety in a bond which he paid after the death of the testator, taking an assignment of the bond: it was held that he was only a simple-contract creditor of the testator. The case of *Hodgson v. Shaw* (d) was decided by Lord *Brougham* on its own peculiar circumstances. His lordship, however, did not question the decision in *Copis v. Middleton*, or any of the other cases, except the case in *Vernon*, which he considered inconsistent with later decisions.

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(a) Turn. & Russ. 224.

(c) 4 Russ. 277.

(b) 2 Molloy, 31, 42.

(d) 3 M. & K. 183.

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Supposing the Court were to direct the assignment of the judgment, the assignee must sue in the name of the party who obtained it. He must also revive his judgment by applying to the Court in which it was obtained. The judgment is more than ten years' standing, and the party dead. If liberty were given to recover it, we might plead satisfaction to the *scire facias*. [*Alderson, B.*—I think that a party applying to revive a judgment of more than ten years' standing must make an affidavit that the judgment is unsatisfied.] That may almost be inferred from the 79th General Rule, Hil. Term, 1832 (a). How could the Bournes, the plaintiffs at law, make such an affidavit? But suppose the affidavit were made and the judgment revived; if it could be shewn that the plaintiffs at law had been satisfied *aliunde*, would not that be a bar to the *scire facias*? The case put by Mr. Serjeant *Williams* (b) is precisely in point: "When an obligee sues one of two obligors in a joint and several bond in the Common Pleas, and recovers, and afterwards sues the other in the King's Bench, and recovers, if one of them makes satisfaction, the other shall have an *audita querela* to avoid execution against him, for the plaintiff can only have one satisfaction." Upon these authorities it is evident that the judgment now sought to be assigned could not be made available at law, and, consequently, a decree to compel the assignment of it would be totally useless. It is submitted, therefore, that this bill should be dismissed with costs.

Mr. *Spence* and Mr. *Duckworth*, for the defendants, the Bournes.

Mr. *Russell* in reply.—It has been said that the surety is not entitled to any other securities than those that are

(b) See 3 B. & Ad. 385.

(a) 2 Wms. Saund. 148, n. (1).

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given at the time he becomes surety. There is no authority for that proposition. In *Wade v. Coope* (a), the security of which the surety sought to avail himself had been given, it is true, at a different time; but it was given for a distinct debt, or, what is the same thing, a distinct part of the original debt: and the decision of the Court went entirely upon that ground. The time when the securities are given is of no importance. If I am a surety, and the creditor avails himself of my liability, I have a right to put in force all the securities for that debt which I can obtain: *Ex parte Rushworth* (b). In *Wright v. Morley*, the surety was held entitled to the benefit of a security to which he was not a party; and in *Hodgson v. Shaw*, the securities were given at different times. The principle on which the plaintiff's claim depends is, that a surety is entitled to the benefit of all securities which can be made available for his indemnity. But it is said that the judgment against Cawthorne cannot be enforced at law. Is that judgment wholly satisfied by the subsequent judgment against Dowbiggen? The former was for the whole 1481*l.* 10*s.*; the latter for 1277*l.* 4*s.* 8*d.* only. It is admitted that Dowbiggen paid the whole debt. Supposing then the second judgment to be a satisfaction of the first, to the extent of 1277*l.* 4*s.* 8*d.*, why is the surety not entitled to the first security to the extent of the residue of 200*l.* and upwards? [Alderson, B.—Would not that be an inequitable judgment as against Cawthorne on the part of Bourne, if 1277*l.* 4*s.* 8*d.* was all that was due to him? How do you make out that you could in any way make that judgment available against Cawthorne?] At all events, the payments made by the sureties anterior to the judgment against Cawthorne, could not be in satisfaction of that judgment. [Alderson, B.—Supposing the Bournes alone concerned, and it appeared by their affidavit, on ap-

(a) 2 Sim. 155.

(b) 10 Ves. 409.

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plication to recover the judgment, that the debt had been paid by the surety, would a court of law allow execution on the judgment against Cawthorne?] If the plaintiff applied for a *scire facias*, the debtor could make no defence: Bac. Abr. *Scire Facias*, E. *Auditâ Querelâ*, B. [Alderson, B.—A court of law only looks to the parties before the Court. Now, taking the Bournes to be the only parties interested, the Court would not allow them to issue execution against Cawthorne for a debt already satisfied.]

ALDERSON, B.—It seems to me that, if the plaintiff is entitled to any relief at law, she is entitled to the assignment of this judgment; but that, if that judgment cannot be made available at law, I ought not to make an order which would be entirely useless. The authorities are clear that I ought not to make such an order. The point which I shall take time to consider is, whether, if the judgment were assigned, it could be made available at law.

Feb. 15th.

ALDERSON, B.—I expressed my opinion on the hearing of this case, that the plaintiff could not derive any benefit from the assignment of the judgment against Cawthorne; and that, supposing that to be the case, there was not any ground for the interference of a court of equity to decree that assignment. The question I desired an opportunity to consider, was, whether under the circumstances there would be any remedy at law, supposing an assignment of the judgment were actually executed to the executors of Mr. Dowbiggen. It is quite clear from the authorities, that a surety who pays the debt of the principal debtor is entitled to the benefit of all those securities which the creditor himself could render available against the principal debtor. That point was in effect determined by Chief Baron *Alexander*, on the argument of the demurrer in this case; and I cannot help regretting that he did not then dispose of the question of law which is now raised,

and which was as ripe for discussion seven years ago as it is at the present time.

In this case the assignee, if he obtain an assignment of the judgment, must necessarily proceed in the name of the assignor, to enforce that judgment. Now, what are the facts of the case? A joint and several promissory note was entered into by Cawthorne and Dowbiggen as his surety. The note when due was not paid, and the payee of the promissory note brought an action, and obtained judgment for the full amount of the note and interest against Cawthorne, the principal debtor, for I think it is fully established that Cawthorne was the principal debtor. The holder of the note, having obtained this judgment against Cawthorne, finding that it was not likely to be made available, brought another action, as he was entitled to do, against Dowbiggen the surety, and recovered judgment against Dowbiggen for the amount of the note and interest. Dowbiggen paid the amount of the principal money and interest due on the note, and the costs of the action against him, and the holder of the note, having been thus satisfied the whole of the principal money and interest, had no further claim, except perhaps in respect of the costs of the action against Cawthorne; and if he had afterwards ventured to proceed on the judgment against Cawthorne, the Court of King's Bench, in which the judgment was recovered, would have interfered in a summary manner to stay proceedings on the judgment, except for these costs. The whole effect, therefore, of assigning the judgment to the plaintiff would be to give her that which would be wholly useless, except for the purpose of recovering the costs of the action against Cawthorne, and to which, as administratrix of Dowbiggen, she could not possibly have any right. And that it had been felt that she had no such right, was evident from the tender to the defendants, the Bournes, of those costs. The case in substance is not distinguishable from the case (a) before Lord

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(a) Turn. & Russ. 231.

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Eldon, in which he says, that if a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety paying the bond has a right to stand in the place of the mortgagee; but that if there is nothing but the bond, the surety, after discharging it, cannot set it up against the principal debtor.

It appears to me that any assignment of the judgment would be entirely useless; and, therefore, under the whole of the circumstances, I think the bill must be dismissed; but as the Bournes might, I think, readily have given to Mrs. Dowbiggen what she required, though it was perfectly useless, I think the bill must be dismissed against them without costs. There is no ground or pretext for making the surety pay the costs of the principal: the bill must, therefore, also be dismissed without costs against the defendant Cawthorne.

See *Reed v. Norris*, 2 Myl. & C. 136.

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The general rule is, that no other evidence can be given at a rehearing than might have been given at the hearing. Therefore, where a document is not included in the order of course to prove exhibits *vid voce* at the hearing, or when the plaintiff has obtained no such order, he cannot obtain an order to prove an exhibit *vid voce* at a rehearing without a special application.

THE plaintiff in this cause presented his petition of rehearing, for the purpose of having that part of the judgment reversed which directed an inquiry as to what proportions of the sum of 3000*l.*, paid by the plaintiff, had been received by the defendants, Hicks, Watson, and Todd, and which decreed that those defendants should repay the same, and that the bill should be dismissed against the defendant Smith (*a*). The object of the petition was to make the defendant Smith equally liable with the other defendants, Hicks being insolvent and abroad, Todd being in poor circumstances, and Watson being dead, and his representative not admitting assets.

The plaintiff, by his petition, stated, that it appeared, from the terms of the articles of agreement of the 3rd March, 1832, and the receipt indorsed thereon, as well as

(*a*) See ante, p. 58.

from the answers of the defendants, and from other matters in evidence, that the defendants Hicks, Smith, Todd, and Watson, were jointly interested in the profits of the patent, and that the agreement in question was entered into by the petitioner with the defendants jointly; that the said sum of 3000*l.* was in fact paid by the petitioner to the defendants jointly, or on their joint account; that the petitioner had in his possession a bill of exchange for 1000*l.*, which he had given to the defendants in part payment of the 3000*l.*; that this bill, dated 17th March, 1832, was drawn by the plaintiff upon and accepted by Messieurs Carr Glyn and Company, and was made payable two months after date to Messrs. Hicks, Smith, Todd, and Company, or order; and that it was indorsed in the following words:—"Pay to O. H. Smith, Esq., or order, per procuration of Hicks, Smith & Co.; William Todd; O. H. Smith;" which signatures were in the handwriting of Todd and Smith respectively. Under these circumstances, the plaintiff submitted that the defendants ought to be declared jointly and severally liable to make good the whole of the 3000*l.*, with interest at 5*l.* per cent., together with the costs of the suit; and he prayed that the cause might be reheard for that purpose, and that upon such rehearing he might be at liberty to give in evidence the bill of exchange.

The plaintiff did not originally obtain any order for proving exhibits *vidæ voce* at the hearing, but, after filing this petition, he obtained an order of course to prove the bill of exchange *vidæ voce* at the rehearing, whereupon it was now moved, on the part of the defendants Smith and Todd, that such the order so obtained might be discharged for irregularity, with costs.

Mr. Wigram, Mr. Lynch, and Mr. Heathfield, for the motion.—The only evidence which a party is entitled, as of course, to read at a rehearing, is the evidence which he

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had collected before the hearing: *Williams v. Goodchild* (a). If it can be proved that a party was in a situation to produce certain evidence at the hearing, but that he had omitted to do so, he would be entitled as a matter of course to use that evidence at the rehearing; but he can read no other evidence without a special application. Here there was no order to prove exhibits *vivâ voce* at the hearing; there must, therefore, be a special case to entitle the plaintiff to that proof at the rehearing: *Wilde v. Ward* (b), *Cutten v. Sanger* (c). In *Bingham v. Dawson* (d), Lord Eldon refused to allow a supplemental bill to be filed for the purpose of introducing new evidence, where the proper means for searching for it had not been used previously to the decree. Here the plaintiff cannot say that he did not know of this bill of exchange before the hearing. He is altogether silent upon that point. He ought, however, upon the authority of *Partridge v. Usborne* (e), to have shewn, first, that he had used due diligence in proving the document originally; and, secondly, that it is material to the issue. The Court of Chancery has unquestionably, in some cases, admitted documentary evidence upon an appeal which was not used at the hearing. That was done in *Dashwood v. Lord Bulkeley* (f), and *Buckmaster v. Harrop* (g), though under what special circumstances does not appear. It is clear, however, that it could not be done of course: *Higgins v. Mills* (h). Even upon the original hearing, the Court of Chancery is extremely jealous of allowing an interrogatory to be exhibited for the purpose of introducing new evidence after the cause has come to a hearing: *Cox v. Allingham* (i), *Wood v. Lindsay* (k). This Court is undoubtedly less

(a) 2 Russ. 91.

(b) 2 Y. & J. 381.

(c) 3 Y. & J. 374.

(d) Jac. 243.

(e) 5 Russ. 195.

(f) 10 Ves. 230.

(g) 13 Ves. 456.

(h) 5 Russ. 287.

(i) Jac. 337.

(k) 4 Sim. 3 n.

strict in matters of this nature than the Court of Chancery; but though it will permit the proof of documents at a rehearing which were not used at the original hearing, it will be guided in its discretion by affidavits stating special circumstances.

The defendants rely on the strict rule of practice in this case, because it is obvious, from the statement in the petition, that the plaintiff is seeking, by means of this document, to establish a partnership between these defendants—a point which is not charged in the bill, and is, therefore, not in issue. If it were in issue, it would be sufficient to say that *Dickenson v. Valpy* (a) distinguishes this kind of part-ownership from ordinary partnerships. That question, however, has not been raised by the pleadings: and on that ground alone your Lordship will refuse to allow the proof of this document. [*Alderson, B.*—If the document is immaterial, it will be rejected when tendered. Your proper point is, that it could not have been used in evidence originally, and therefore cannot now.]

Mr. Knight, Mr. Spence, and Mr. Blunt, contra.—The question is not now *what* evidence your Lordship will receive on the rehearing; and it is quite consistent with the failure of this motion, that the document in question should not be allowed to be read. The order is, that the plaintiff be at liberty to read the exhibit at the rehearing, saving all just exceptions which shall be taken to the reading thereof. You cannot discuss the admissibility of the evidence on a motion of this sort. The mere proof of the handwriting of the party will not make the document evidence, and, therefore, the materiality or admissibility of it as evidence is entirely out of the question.

If this order had been obtained before the original hearing, the present motion would not have been sus-

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tained for a moment; and the only question is, whether the order thus obtained before a rehearing will not equally avail the plaintiff. In a court of equity, a rehearing is a matter of right. It is not like an application for a new trial at law, which must be founded on special circumstances. In Chancery, if a decree is not inrolled, you may rehear after twenty years. In this Court the time for rehearing is very limited, but the right to a rehearing is indisputable. That being so, it is clear that a party may introduce at the rehearing any documentary evidence that he pleases, without any special order. Upon a rehearing the question is not, as it is upon an appeal in the House of Lords, whether the Judge below has decided right or wrong; and, consequently, there is no necessity to be bound by the evidence used in the Court below. That was very apparent in the case of *Lambert v. Fisher* (a), where the Vice Chancellor having decided in favour of the plaintiffs, who were lessees of Trinity College, Cambridge, the cause was reheard before Lord Brougham, upon documentary evidence which was then produced for the College, but which had not been produced at the original hearing; and his Lordship decided the case the other way, and made the College pay the costs for not using the documents in question at the original hearing. [*Alderson, B.*—The difficulty here is, that if this order had been obtained in the first instance, it would only have applied to documents which were then in the party's possession. Documents, however, may be subsequently discovered; and the question is, whether it is the practice to allow the production of those documents as a matter of course.] Whatever is true of an original hearing is true of a rehearing. You cannot add to the interrogatories after publication passed, either on the hearing or the rehearing; but you may apply in either case to prove an exhibit *vide*

(a) Not reported on this point.

voce: *Gilb. For. Rom.* 183, ed. 1758; *Walker v. Symonds* (a). The authorities cited on the other side are not inconsistent with this statement of the practice. In *Wilde v. Ward*, the Lord Chief Baron admitted that the lease of 1804, though from neglect it was not proved at the hearing, might be proved *vidé voce* at the rehearing. In *Williams v. Goodchild*, other evidence besides documentary evidence was required. The cause was reheard after the trial of an issue, and it was sought to introduce at the hearing evidence, beyond that of documents, which had been brought forward at the trial. *Higgins v. Mills* decides nothing but that a party may, if he pleases, have an order to prove exhibits, upon notice; but he must pay his adversary's costs, if he brings him into Court. The other cases only shew generally that you cannot add to evidence upon interrogatory without a special case. They are such as would have equally applied before the original hearing and after publication passed. Where a special case is required, it is equally necessary after publication and before hearing, as after the hearing.

Mr. *Wigram*, in reply.—If in the Court of Chancery the hearing and rehearing of a cause are considered as the same thing in regard to the proof of written documents, the reason is, that in Chancery the order to prove exhibits *vidé voce* is obtained without specifying the exhibits; so that it is not known what documents are in the plaintiff's possession at the hearing. In this Court the practice is, to specify the exhibits; therefore, if they are not included in the order before the hearing, they cannot be proved after the hearing without a special application. Even in the Court of Chancery the proper course is to make a special application, and that seems to have been done in *Walker v. Symonds*, where, as appears from the

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(a) 1 Mer. 35 n.

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Registrar's book, Sir Samuel Romilly appeared for the defendants (a).

ALDERSON, B.—Unless the practice is settled in regard to the point now at issue, it seems to me most reasonable, and most consistent with justice, that what a party is not in a condition to prove at the hearing should be treated as new evidence on a rehearing; and that to take into consideration the causes of a party's omitting to produce the documents at the hearing would be to introduce too nice distinctions. I shall leave the point to be settled according to the practice of the Court of Chancery. If that is not settled, I am of opinion that there ought to have been a special application to prove this exhibit, and that the present motion must be granted.

Feb. 15th.

ALDERSON, B.—In this case I took time to consider whether or not I should agree to the motion for setting aside for irregularity an order which had been obtained to prove a document *vidé voce*. It was pressed very much upon me, in the course of the argument, that it was the settled practice in the Court of Chancery to admit those

(a) L. C. Saturday, 4th Aug. 1810. *Walker v. Symonds*. Upon motion this day made into this Court by Mr. *Roupe*, of counsel for the plaintiffs, it was prayed that the plaintiffs might be at liberty at the hearing of this cause on the petition of appeal presented by them, to examine one or more person or persons *vidé voce* to prove the handwriting of Thomas Griffiths deceased, in the pleadings of this cause named, and a letter from him to the plaintiff Love-day Walker, dated the 12th day of January, 1796; also the hand-

writing of George Tickner Hardy deceased, to two several letters from him to the plaintiff, Love-day Walker, dated respectively the 27th day of April and 24th day of May, 1797; and a letter from the said George Tickner Hardy to — Ryder, Esq., New-square, Lincoln's-inn, dated the 2nd day of June, 1801, which, upon hearing Sir Samuel Romilly, of counsel for the defendants, is ordered accordingly, saving all just exceptions; and hereof notice is to be given forthwith.

orders *ex parte*, as a matter of course. It appears to me, upon the whole of the argument, that the principle of the thing lies altogether the other way.

At a rehearing the general rule is this—distinguishing it from an appeal—that all evidence which was capable of being given at the time of the hearing, though it was not given, may be given at the rehearing; but that on an appeal the evidence only which was actually given at the hearing is capable of being given at the time when the appeal is heard—and for the very best of all reasons—an appeal is from a judgment of the judge to another tribunal; and it is, therefore, only justice to the Court below to act on the same grounds on which the Court below acted; but a rehearing being before the same Court, is merely an application to that Court, upon fuller investigation, to determine the question which it has before decided upon less information.

An appeal in the Court of Chancery has, no doubt, the nature of a rehearing. It partakes of the double character of both the one and the other. It is a rehearing, but before a different judge. I have sent to the Court of Chancery, and I cannot find, on the best investigation, that there is any settled practice at all on the subject. Out of three registrars that have been consulted, two are of opinion that it is not an *ex parte* application, and one that it is an *ex parte* application: and we find in an old manuscript book of Mr. *Deaves*, who was a registrar or secretary to seven successive Masters of the Rolls, a note to this effect:—"That, on a rehearing, further evidence and further documents may on some occasions be produced"—the effect of which would rather be to shew, that it was not an *ex parte* application; for, as he expresses it, the production will be allowed "on some occasions," not on all. Now, that being the state of the practice in the Court of Chancery, and there being no settled practice in this Court on the subject, it comes to be con-

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sidered what is the principle which ought to govern it: and the best way is to settle the practice as much as one can consistently with right reason and principle. That being so, it appears to me that it would be drawing too nice distinctions if I did not hold it as a general rule, that that evidence which might have been given at the time of the hearing, and no other, may be given at the rehearing. In this court it is the settled practice to specify the documents, which are to be proved *vivâ voce*, in the order for proving them. If, therefore, a party had obtained any order to prove particular documents *vivâ voce* at the time of the hearing, of course he may put in under that order such of those documents as he may be advised at the rehearing; but if the new documents were not included in that order, I think the production of those new documents at the rehearing is new evidence; and that I ought to hold that new evidence cannot be produced at the rehearing without a special order. The result of this opinion is, that the order in question must be set aside; but, as the point is new, without costs.

I ought to add, that it appears from the note of *Walker v. Symonds*, as cited from the Registrar's book, that the application in that case was not *ex parte*, but that, on the contrary, Sir Samuel Romilly was heard for the defendants. That case, therefore, is an authority for granting the present motion.

Order accordingly.

May 10th.

Exhibit not proved at the hearing, upon special application allowed to be proved *vivâ voce* at the rehearing.

In consequence of the foregoing decision the plaintiff moved specially to prove the exhibit *vivâ voce*. The motion was opposed, on the ground that the plaintiff had the document in his possession at the time of the hearing, and might then have proved it; that the defendants ought not to suffer from the plaintiff's neglect in that respect; that a court of equity will not allow a party to bring forward his case by piece-meal; and that, according to all the authorities, the neglect of a party to prove his docu-

ments at the hearing was a sufficient reason for refusing a motion of this nature.

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ALDERSON, B.—My own opinion is, that parties ought not to be allowed to produce new evidence upon a rehearing; but it has been done over and over again, and I must take the practice as I find it. It is certainly very objectionable; and, where the rehearing is before another Judge, it is a crying evil: but it being the practice, I must allow the documents to be proved.

The case was then reheard on the merits. The principal documents which were relied upon on either side, and which were in evidence at the hearing, were the agreements of the 3rd March, 1832, and the 16th November, 1831. By the former of these documents, which was made between the defendant Hicks of the first part; the defendants Smith, Watson, and Todd of the second part; and the plaintiff of the third part; reciting the grant of the patent to Hicks; and that Smith, Watson, and Todd were jointly interested with Hicks in the patent, and the profits thereof; and that Hicks and the others had contracted with the plaintiff to grant to him a licence to make use of the invention within the town of Birmingham, and a certain specified district around it: It was witnessed, that in consideration of the sum of 1000*l.* paid to Hicks, Smith, Watson, and Todd by the plaintiff, the receipt whereof they all thereby acknowledged, and therefrom did each and every of them acquit, release, and discharge the plaintiff; and for the other valuable considerations therein mentioned, Hicks, with the consent and approbation of Smith, Watson, and Todd, testified, &c., and also Smith, Watson, and Todd, according to their respective shares and interest in the premises, did thereby, for themselves, their executors, &c., severally and respectively give and grant to the plaintiff, his executors, &c., the licence and consent of Hicks, and also of Smith, Watson, and Todd, that the plaintiff, his executors, &c., should and might,

Joint owners of a patent for a particular process used in carrying on a trade, are answerable *in solido* for the losses occasioned in relation to the patent by the frauds of their co-adventurers.

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during the term therein mentioned, exercise and make use of the said invention within the district round Birmingham before mentioned.

By the agreement, dated the 16th November, 1831, the defendant Smith assigned to Hicks all his interest in the sale of licences in the town and neighbourhood of Birmingham, and other places mentioned in the agreement.

There was contradictory evidence as to whether the plaintiff had notice of the situation of Smith when he contracted with the defendants. It was proved, that the plaintiff attended by appointment at Sir George Duckett's banking-house, about the 18th of March, 1832, at which time and place all the defendants were present, and that the plaintiff then offered to pay the sum of 1000*l.*, part of the entire consideration, by means of the bill of exchange now produced; and according to the plaintiff's statement in his affidavit, made in support of the foregoing motion, the bill was seen and not objected to by the defendant Smith, and nothing was said as to his limited interest in the concern. The defendants, Smith and Todd, however, by their counter-affidavits, swore that it was distinctly stated to the plaintiff at the meeting, that Smith had parted with all his interest in the patent, so far as affected the plaintiff's right. With respect to the bill of exchange, the defendant Smith swore that it was drawn by the plaintiff without his, the defendant's, sanction or privity, but that it was afterwards indorsed to him specially by the other defendants, as a security for a sum for which they had rendered him liable to Messrs. Duckett, and that he subsequently indorsed it, not as a part of the indorsement for procuration, but solely to acquit the indorsement made to him or his order.

Mr. Knight, Mr. Spence, and Mr. Blunt, for the plaintiff.—On the evidence, it is clear that there was a joint interest in the defendants in the patent and all its profits.

They receive the money jointly, they enter into joint covenants, they bring a joint action, and they put in a joint answer. On the other side there is only the agreement of November, 1831, and a conversation, in which it is stated, but contradicted, that Smith told the plaintiff he had parted with his interest. Supposing the joint interest to be clearly made out, it surely cannot be contended that a joint interest in a patent is not a partnership. To what is the law of partnership to be extended, if not to a joint interest in a patent for baking bread? *Holmes v. Higgins* (a), *Dry v. Boswell* (b), and *Green v. Beesley* (c), are authorities to shew, that the general law of partnership is not to be confined to buying and selling goods, but to all sorts of speculations. Here the benefits received were proved to be joint, and the payments proved to be joint; but, suppose even that it was proved that there was no partnership, that the payments were several, that Smith had received nothing, and had ceased to have any interest, and that the only money paid had come to Hicks alone, might not the plaintiff still say that the parties who had led him into this difficulty were several persons, of whom Smith was one, and might he not fairly and reasonably argue that Smith was bound to indemnify him?

Mr. *Wigram*, Mr. *Lynch*, and Mr. *Heathfield*, for the defendants.—If, by means of Hicks's fraud, the other defendants had been benefited at the plaintiff's expense, they would have been clearly bound to refund. "But then," as your Lordship observed in your judgment at the hearing, "the other defendants are not affected directly or indirectly with that fraud, and have only received their proportional shares of the money through Hicks." The conclusion which your Lordship drew from these facts

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(a) 1 B. & C. 74; 2 D. & R. 196.

(b) 1 Camp. 330.

(c) 2 Scott, 164; 2 Bing. N. C. 108.

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was, that the parties were liable only in proportion to the monies actually received. Your Lordship's judgment as to the separate liabilities was applicable to all the defendants, and did not depend solely upon the circumstances relating to Smith. What then has altered the situation of the parties since the hearing? Not the bill of exchange, because it is evident that the partnership had made Smith liable for monies overdrawn by them, and had given him the bill in payment. Nor can it be said that Smith is inconsistent in any of his statements. It is true that he remained, at law, assignee of the patent, but he had parted with his interest in the licences in particular districts; and the plaintiff knew that fact. Even if he did not know that, he knew that the defendants had each a separate interest in the patent, as tenants in common; and the question is, whether, under such circumstances, the fraud affects any but those who received the money. The plaintiff knew that Hicks was the original patentee, and that there had been an assignment of Hicks's sole interest, so as to give a participation to the other three. It is not questioned that the parties had several interests in the patent. Admitting, therefore, that this was a species of partnership, how were they answerable for each other's frauds? In the common case of a partnership, there is a general dealing, and thence there is a general authority on each partner to act for his co-partners. But it is otherwise where the parties, being tenants in common of a particular thing, agree to divide the profits. If the plaintiff could say that every act of Hicks was the act of these defendants, they would of course be liable; but here Hicks was a partner only for particular purposes, and therefore it is impossible to make him an agent for the others to the extent of committing this fraud. If I appoint an agent, whatever he does within the limits of his agency I am bound by. But suppose the agent commit a fraud not within the limits of his agency, I am not liable

for the misapprehension of a third person that he acted within those limits. When he is out of those limits he cannot affect me. The plaintiff says, a fraud is committed by your agent. I say, he is not my agent; the ground of the suit negatives an agency. I have been as much cheated as you. Payment to him is no payment to me, and you must prove actual receipt by me in order to charge me. [*Alderson, B.*—The question is, whether subsequent receipt does not make him an agent.] Upon the supposition that this is an ordinary partnership, it would be so; but here, not only is the interest of the parties several, but it is not even a case of trading. The parties do not work the patent, and the profits which they derive from it are not received in the ordinary manner of profits. In the case of an ordinary partnership, parties deal with the partners on the credit of each, but it is otherwise where they deal with the joint proprietors of a chattel. The joint owners of a licence must join for conformity in receipts, but the money is received severally, and that takes it out of the rule relating to a mixed fund, where each party is liable for the whole. This is like the case of trustees, of whom they only are charged who actually receive. If it were a partnership transaction, payment to Hicks alone, without the knowledge of the others, would render the others liable; it would not be necessary to shew a joint receipt. It is clear, from the acts of the parties, that this was not a transaction of giving credit as to an ordinary partnership, but a mere naked payment. The deed of March, 1832, does indeed recite that the parties were jointly interested; but the grant of the licence is not joint, but according to their respective shares; and in regard to the bill of exchange, if this were a common partnership, where was the necessity for a special indorsement? Upon the whole, it is submitted, that if the plaintiff knew, as he clearly did, that the defendants were interested in this patent severally, in *some* proportions, though in *what* proportions he might be ignorant, that is

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sufficient to exclude the notion of his dealing with an ordinary partnership; and in that case, it will be impossible to follow these monies into the hands of any person, except him who benefits by the fraud.

Mr. *Knight*, in reply.—Cases of ordinary partnership are not confined to actual trade. Horsing a coach is a mere agency; so is an interest in a railway scheme, or in working a vessel. Where a vessel is worked for an adventure, the adventurers are partners as to that. Here the defendants are jointly interested in the profits of this patent, and that constitutes an ordinary partnership. Their interests may be indeed in certain respects qualified, but the general partnership interest remains qualified only as to certain terms. Their own deed provides that the profits shall be divided amongst them, according to their respective interests. It alleges a joint interest, and the covenants to pay are joint. If Smith was a mere partner for conformity, why should he take the covenants to pay? The covenants to pay are with the four, and to pay to the four. The subsequent conversion, if it took place, amounts to nothing. He was bound in the first instance, and cannot be afterwards heard to say that he was not bound.

June 21st.

ALDERSON, B.—I have again maturely considered this case. I intimated in the course of the argument, after having fully heard the acute observations of the counsel for the defendants, that I saw no reason to change the opinion I before delivered on the main question in this cause. I was then, and I still am satisfied that the plain-
has made out a case of fraud entitling him to relief in a court of equity. The extent of that relief was the subject of his petition for a rehearing, and upon that I now propose to give my revised opinion.

It seems to me clearly established, as it did before, that the rest of the defendants had no knowledge of the

fraudulent misrepresentations made by Hicks; but the money paid by the plaintiff in consequence of those misrepresentations, has been paid to all under a joint contract by all, and they have all signed the receipt. As to Todd and Watson, there is nothing to shew any knowledge by the plaintiff of their particular interests; and even as to Smith, I think, that, on the former occasion, I placed too much reliance on the circumstance spoken to by Mr. Todd. On more full consideration, I am satisfied that in this respect my judgment was erroneous; and that, what would unquestionably have been the rule at law, ought also to be considered the rule in equity. At law, they would all have been equally bound to repay *in solido* to the plaintiff the money received from him upon a consideration which had failed altogether. This was my own impression when I first heard the cause.

I am now satisfied that the decree must be varied as to the 3000*l.* paid, by directing that it be repaid by the defendants; and that the plaintiff is entitled generally to the costs of the suit.

Decree accordingly.

With respect to the degree of notice with which it is requisite for the partner to fix the creditor, in order to extinguish the ordinary partnership liability, there is no distinction in principle between general partnerships and partnerships in particular transactions. In either case, the question, whether the creditor had *constructive* notice of limited liability, will depend on the question whether the transaction which gives occasion to the doubt was within the scope and usual course of the partnership dealings. "All partnerships," says Chancellor Kent, "are more or less limited. There is none that embrace, at the same times, every branch of

business, and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, unless there be circumstances or proof in the case to destroy the presumption, that he deals with him on his private account, notwithstanding the partnership name be assumed. The conclusion is otherwise, if the subject-matter of the contract was consistent with the partnership business; and the defendants, in that case, would be bound to shew that the contract was out of the regular course of the partnership dealings." Kent's Commentaries, Vol. 3, p. 42, 3rd ed.

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A. and B. were directors in the W. M. Waterworks Company, in which no shareholder can act as a director without holding ten shares. A. and B. being intimate friends, the latter advanced to the former several sums of money. The last of these advances was made on the 23rd July, 1829, on which day A. delivered to B. an order upon the Secretary of the Company to transfer A.'s ten shares into B.'s name. B. did not at that time make use of the order, and A. continued to act as director until his death, in May, 1832. A.'s affairs being insolvent, and a suit having been instituted for the administration of his assets, B. then served the order of transfer on the secretary, and presented his petition in the suit, claiming an equitable lien on A.'s ten shares for the amount of his advances, with interest:—*Held*, that these circumstances were not sufficient to shew an intention to create a lien on the shares; and, consequently, B.'s claim was rejected.

Mortgagee of shares in a company must give notice of his incumbrance to the secretary, or his lien will be lost, as against a subsequent purchaser for valuable consideration without notice.

Where the qualification of a party to act as a director of a company consists in his being the proprietor of a certain number of shares, the qualification will not be lost by a mortgage of those shares.

THIS was a suit instituted by the creditors of the late Charles Elton Prescott, Esq., for the administration of his assets; and the question was, whether a person of the name of Stedman was entitled to a lien on ten shares (personal property) in the West Middlesex Water Works Company, standing in the name of Prescott, as a security for a debt of 1033*l.* 12*s.* 2*d.*, alleged to be due from Prescott to Stedman. The claim in question had been brought before the Master upon the petition of Stedman, praying to have the benefit of the lien. Stedman likewise tendered an affidavit of the debt, but the Master rejected that evidence. The Master, however, allowed the claim upon the testimony of several witnesses to the following circumstances.

Prescott and Stedman were both directors of the West Middlesex Water Works Company, and were on terms of great intimacy. Divers sums of money had on various occasions been advanced by Stedman to Prescott, and the last of such sums, namely, 400*l.*, was advanced on the 23rd July, 1829, on which day Prescott wrote and delivered to Stedman the following order upon the secretary of the company.

“ July 23rd, 1829.

“ My dear Sir,—Transfer my ten shares in the West Middlesex Water Works Company into Mr. Stedman's name.

“ C. E. Prescott.

“ To M. K. Knight, Esq., Secretary, &c.”

Prescott's qualification as director depended on his holding the above-mentioned ten shares; and notwithstanding the order so given for a transfer of his shares, he continued to act as director until his death in May, 1832. In fact, the order was never acted upon by Stedman until that time. Upon Prescott's death, Stedman sent the following notice to the Secretary of the Company:—

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“ Sir,—I beg to inform you that the ten shares which are standing in the books of the Company in the name of the late C. E. Prescott, Esq., were by him, in his lifetime, charged with the payment to me of divers sums of money advanced and lent by me to him, amounting altogether to the sum of 1,033*l.* 12*s.* 2*d.*, with interest thereon; and that the accompanying authority from the late C. E. Prescott to you to transfer such shares into my name was accordingly given by him to me. I therefore hereby give you notice of such my charge, and of my intention to call for a legal transfer of such shares from the representatives of the late C. E. Prescott, Esq., to me, and in the meantime I have to request you will not transfer the shares, nor pay any dividends due or to become due thereon, to any person other than to me or my order.

“ A. STEDMAN.

“ To M. K. Knight, Esq., Secretary, &c.”

Upon these facts the Master found that, inasmuch as the last of the several sums lent had been advanced on the same day on which the order for the transfer was given, that order was to be considered as a valid agreement for the transfer of the ten shares, and an available security in the hands of Stedman.

To this report exceptions were taken.

Mr. Twiss, and Mr. Teed, for the exceptions.—The letter of the 23rd July, 1829, did not amount to a transfer.

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If Prescott had put into Stedman's hands the shares and the title-deeds relating to them, it might be a transfer in equity, if consistent with the terms of the act. But it is the gist of Stedman's case, that he kept the order for a transfer of the shares in his pocket. One of the objects of the act was to give a shareholder a common interest; for it says, not only that no proprietor, but that no director shall act without having ten shares. Now, if Prescott was not the real owner of these shares, but a trustee only for Stedman, while at the same time he continued in the directorship, that transaction was a fraud upon the act, and the Court will not give effect to it. Admitting, however, that such a transfer as this might be made, there is no sufficient evidence of a valid consideration for it. No consideration appears on the order itself; and the only evidence of the loan having been made is the declaration made by Prescott as to the 400*l*.

Mr. *Lane*, for the administratrix of Prescott.

Mr. *Simpkinson*, and Mr. *Duckworth*, for Stedman.—The latter part of the argument on the other side is not warranted by the Master's report. It is a discussion on the evidence which led the Master to find that the sums were advanced and lent by Stedman to Prescott. He finds the advance of divers sums of money at various times, and the giving the note or the direction to transfer, and he finds that such transactions amount to an agreement to transfer. Now, the exceptions admit the finding as to the loans to be a proper finding. They do not impeach the finding of the facts, but only the conclusion which the Master has drawn. It is true, that if the Master had admitted the affidavit of Stedman, (which he ought to have done), the case would have been stronger in Stedman's favour; but, upon the whole, the evidence is a sufficient foundation for the Master's report.

With respect to the objection to the mode of transfer, it is clear that the act does not prevent equitable contracts in regard to shares. It might as well be said that there can be no equitable contract in regard to stock. The act of Parliament only prescribes the legal form of the transfer (a). [*The Lord Chief Baron*.—Suppose Prescott had

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(a) By the 29th section of the stat. 46 Geo. 3, c. cxix., under which the West Middlesex Waterworks Company is constituted, it is enacted, that it shall be lawful for the several proprietors of that undertaking, his, her, or their respective executors, administrators, and assigns, to sell and dispose of any share or shares to which he, she, or they may be entitled therein, subject to the rules and conditions in the act mentioned. The act then prescribes a form of conveyance of the shares, and provides that on every sale the deed of conveyance, being duly executed, shall be kept by the purchaser or purchasers, after the clerk of the Company shall have entered in the books a memorial of such transfer and sale, for the use of the Company, and have testified or endorsed the entry of such memorial on the said deed of sale or transfer; and until such memorial shall have been made and entered as above directed, such purchaser or purchasers shall have no part or share of the profits of the said undertaking, nor any interest for such share or shares paid to him, her, or them, nor any vote in respect thereof as a proprietor or proprietors of the said undertaking.

The 33rd section, reciting, that where the original subscriber of one or more share or shares in the undertaking shall die, become insolvent or bankrupt, or go out of the kingdom, or shall transfer his right and interest to some other person, and no register shall have been made of the transfer thereof with the said clerk, as directed by the act, it may not be in the power of the Company to know who is the proprietor of such share or shares, in order to bring any action or actions against him, her, or them, for the calls on such shares, or for the purpose of safely paying him, her, or them the interest or dividends to which he, she, or they may be entitled by virtue thereof, enacts, that in all such cases where the right and property in one or more share or shares in the said undertaking shall pass from the original proprietor thereof to any other person or persons by any other legal means than by a transfer or conveyance thereof as herein directed, an affidavit shall be made and sworn to by two credible persons before one of his Majesty's justices of the peace, stating the manner in which such share or shares hath or have passed to such other person or persons; and such

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given Stedman a power of attorney to transfer the shares, and the latter had kept it in his possession till Prescott's death.] The power would have expired, but a court of equity would give it effect. [The *Lord Chief Baron*.—If Prescott had said, I give you the power of attorney, but I rely upon your not using it till you see occasion; if you see me likely to fail, or from any other cause you suspect me, then use it, but not else,—would not that agreement have been limited to the life of the parties? As against the individual who gave the option, the creditor might have enforced it; but when the *jus tertii* intervenes, he cannot. The moment a man dies, his creditors become interested in his assets.] The Master has found that this is an existing agreement. Suppose I agree to make a mortgage, but the agreement is not enforced in my lifetime,—can it be said that it will not be an equitable mortgage after my decease? This is an equitable agreement to transfer, and it is as binding as if he had said—"I hereby agree to transfer." [The *Lord Chief Baron*.—If Stedman had delivered this order to Knight, the case would have been clear; but he keeps it in his pocket. Suppose a man desires his attorney to prepare a mortgage to A. B., and A. B. lends the money, but keeps the draft of the mortgage in his pocket until his death, is that sufficient evidence of an agreement to mortgage? If he died next day, it would be evidence. But suppose he kept it four or five years, would that be the same thing?] We

affidavit shall be transmitted to the clerk of the Company, to the intent that he may enter and register the name or names of every such new proprietor or proprietors in the register book, or list of proprietors in the said undertaking, to be kept in the office of the said clerk.

The 32nd section enacts, that

the names of the proprietors, and the number of their shares, shall be entered in a book, and sealed certificates, specifying the share or shares to which they may be entitled; such certificate to be the evidence of the title of each proprietor, but the want thereof not to hinder or prevent him from selling or disposing thereof.

submit that it would be so; the only question being, whether the delay would amount to sufficient evidence of abandonment. [The *Lord Chief Baron*.—Or to sufficient evidence that it was not an unqualified agreement,—that it was qualified by circumstances which we ought now to know.] Taking the case in both points of view, we submit, first, that the delay is no evidence of the agreement having been qualified. Whatever the delay, it can be no evidence that the security was intended for life only, any more than for any other period. It is not likely that so fragile a security should be for life only. Nor, by parity of reasoning, can the delay be evidence of any other qualification. Besides, the Master has found that money has been paid under the agreement. Upon the other point, that of abandonment, the circumstances stated by the Master are sufficient to rebut any such presumption arising from length of time; for he expressly finds that the parties were very intimate, and that if the shares had been assigned in a formal manner, Prescott would have been deprived of his directorship. It is said that the arrangement in that respect was a fraud upon the public; but, if it were, it is not such a fraud as this Court can notice. It is not against public policy.

Mr. *Twiss*, in reply.—With respect to the nature of this security, no observation can be more just, than that it was in the nature of a power of attorney. At law it ceased on the death of the party. In equity, it might be enforced notwithstanding the death of the party, if it could be shewn that it was meant to be made available against his representatives. But it lies on them who seek this equity to shew the facts. They are not entitled to rely on presumptions, but must produce solid proof by means of positive testimony. There are many cases in which Stedman might have been entitled to maintain this claim, but his proofs are wanting. This paper, which

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never came into the hands of Knight, must be considered void by the operation of lapse of time. It was never meant to be ambulatory for so long a period. It may be that there was an option to Stedman either to consider himself as a purchaser in full of the shares, or not to call for a transfer of the shares, but to retain a general right of calling on Prescott to pay the debt. But, whatever the right was, it should, after such a lapse of time, be made manifest. Stedman's case is much weaker than that put by your Lordship, of an intended mortgage, and the title-deeds placed in the hands of the attorney; for here the paper was not put in the hands of the person who was the proper party to hold it.

THE LORD CHIEF BARON.—I must deal with this case as if Stedman had filed a bill against the representatives of Prescott, calling upon them to transfer these shares to him in compliance with a specific contract to that effect. The difficulty which I feel is, to separate from my judgment the impressions received from Stedman's affidavit; but I am bound to do so, and to treat that affidavit in no other way than the bill, which I could not read or look at as evidence, though it might be used for the purpose of drawing any inference or argument from it which could be reasonably suggested.

When a man comes into a court of equity for relief, he must make out his case by the proof of such circumstances as require no further explanation by means of mere conjecture. If there had been clearly some contract in this case, which, though purporting to be for an equitable lien, was attended with circumstances raising some doubt as to its full extent or meaning, the party might possibly have been allowed to introduce evidence to remove the ambiguity; but in this case one is at liberty to conceive many reasons why, if there was any agreement at all, it was not intended to be an equitable lien. I do not say it

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was not so, or that it was not a just conclusion of the Master, that the order to Knight to transfer the shares had some connexion with the loan of the 400*l.*; but, whether or not there was a specific contract that the transfer should be a security for this loan, is the question. Taken by itself, the direction to transfer contains no contract at all. Had it not been the fact that the 400*l.* was lent upon the day on which the note containing the direction is dated, what inference could be drawn from that paper in favour of the alleged equitable lien? I can collect nothing from the transaction, but some uncertain understanding, which had not been acted upon by the parties for three years. Though I may presume that this order had some connexion with the loan, am I bound to presume, on behalf of a gentleman coming into a court of equity, that there was an agreement to execute at all events a transfer of these shares? If I could imagine any cause, or rather, if I could account with any certainty for the delay in putting this paper into the hands of Knight, the difficulty might be removed; but if any one conjecture upon the subject is equally probable with any other, is there any rule in equity (not to say in common sense) why I should enforce this claim? In the case of an equitable mortgage, the title-deeds are in the hands of the party who claims the lien. Here, in order to enforce the claim of a party not using due diligence, I am called upon to presume a contract of a specific character, which he could immediately enforce. There are many circumstances under which the contract may have been made, so as to be only available conditionally. The parties being intimate friends, I can easily conceive that one might say to the other, I don't desire to part with these shares, but here is an order for their transfer, and if I don't pay interest half-yearly for the sums I owe you, then enforce it. Could he enforce that contract in a court of equity? As long as interest was paid he could not. Again, let me suppose

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this case: One party might very well say to the other, I don't like to part with the directorship, but I give you this order, upon the understanding that you may enforce it in case I part with some other property, and thereby lead you to suspect that I may be in difficult circumstances. I am proprietor of certain East India shares; if I am compelled to sell them, enforce this security; if not, keep it. The party giving the security then dies, and the shares are not sold: the condition for enforcing the security does not take place, and the liability under it is at an end.

These are some of the difficulties in the way of decreeing this to be an equitable contract; but there is another, which is by no means unimportant. If Prescott had intended this to be a security by way of equitable lien, nothing would have been more easy than for him to have given notice to Mr. Knight, the secretary, not to transfer the shares without Stedman's consent. If he had so done, and Knight had transferred them without such consent, he would have been a very unfaithful secretary. Prescott would have remained proprietor of the shares till he had actually passed them out of his hands, and the notice to Knight would not have deprived him of his directorship. As the case now stands, it appears that Prescott might have sold these shares at any time, and nothing but a notice to Knight could have prevented it (a). Under such circumstances, the difficulty is in proving that there was a special contract that these shares should be a security for this money; and I do not think that this is a consideration which can be left out of the case. It would be more consistent with the honour of the parties to conjecture, that Prescott was to hold the shares till something was to take place to give Stedman a right to them. That would certainly be more to the honour of the parties, especially as both were directors.

(a) See *Dearle v. Hall*, 3 Russ. 1.

No court of equity will, in the absence of all presumption consistent with a contract, interfere to conjecture a contract to be of such a nature, that the parties intended that one of them should retain the possession and apparent ownership of property, and by-and-bye, when he is insolvent, the other should come forward to the prejudice of creditors, and claim a specific security on that property by way of equitable mortgage. Yet that is Stedman's case. If I were on a jury, I should not of necessity make such a conjecture in such a case; and therefore, sitting here both as judge and jury, though the question comes before me in a different shape, I must treat it in the same manner. I must say I differ from the Master.

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Exceptions allowed (a).

(a) That courts of equity will, upon evidence of an intention to create a specific trust of personal property, give effect to imperfect instruments relating to such property, as declarations of trust, where a valuable consideration was given, and will even struggle

to do the same thing where the instrument was only voluntary, appears from *Colman v. Sarel*, 3 Bro. C. C. 12; *Ellison v. Ellison*, 6 Ves. 662; *Cotteen v. Missing*, 1 Madd. 176; *Bayley v. Boulcott*, 4 Russ. 347.

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is another
Agreements entered into between an attorney and his client for the purchase by the attorney, at an under price, of estates to which the client had good title, but of which he was not in possession, set aside for fraud and maintenance.

Where an account is decreed to be taken of the dealings and transactions between an attorney and his client, in the course of which the attorney has taken securities from the client, the attorney must not only prove the securities, but likewise the consideration for which they were given. Therefore, where a promissory note was given by the client to his attorney under circumstances of great suspicion, but the client was unable, for want of witnesses, to prove fraud in the attorney, the Court, upon decreeing an

account between the parties, directed an inquiry as to whether the attorney could by any, and what, affirmative evidence, prove the consideration for the note.

THE defendant, James Thomas, of Llandilo, in the county of Carnarvon, for some years previous to the year 1826 acted as the plaintiff's attorney, and in that character acquired and exercised great influence over the plaintiff, who was a Welsh clergyman, totally ignorant of law, and a relation of the defendant, being his first cousin once removed.

In 1820, Thomas, being in want of money, borrowed of the plaintiff the sum of 116*l.* 2*s.*, for which he gave his promissory note, dated the 16th May, 1820, and payable to the plaintiff on demand. A memorandum was endorsed on the note to the effect, that the money should not be called in without three months' notice to Thomas.

In the year 1823, Thomas, being instructed by the plaintiff to recover a small debt for him, commenced an action against the debtor. That action was subsequently discontinued at the instance of the plaintiff, and the costs of the defendant in the action, amounting to 32*l.* 7*s.* 6*d.*, were paid by Thomas on the plaintiff's account. Thomas immediately afterwards applied to the plaintiff to pay these costs, which the plaintiff not being prepared to do, was persuaded by Thomas to give his promissory note at two months for the amount. This took place on the 25th September, 1823, on which day the note was dated. According to the plaintiff's statement, the note was given merely as a security for costs, and under an express understanding that it should not be negotiated. That, however, was denied by Thomas in his answer; and, at all events, he negotiated and received value for the note. It was afterwards presented to the plaintiff for payment, but he was unable to pay it.

In consequence of the dishonour of this note, Thomas went to Brecon, about six miles from the plaintiff's, whence he sent the plaintiff the following note:—

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“Castle Inn, Brecon, Dec. 2, 1823.

“Dear Sir,—I shall remain here until half-past two, when I intend to return by the mail. I have sent this letter to you by a purpose messenger, to request that you will come over immediately, as I particularly wish to see you. Your draft is returned, and must be renewed, so as to prevent law expenses, but don't be in the least alarmed, for there is no danger.

“I am, dear Sir, &c. &c.

“JAMES THOMAS.”

The plaintiff, in answer to this note, sent a note to Thomas, in which (according to his own statement) he directed Thomas to pay the 32*l.* 7*s.* 6*d.*, and set it off against the note for 116*l.* 2*s.* Thomas, on the other hand, swore to his belief that the purport of that note only was, that it was inconvenient to the plaintiff to leave home at that time. In answer to that note, Thomas wrote as follows:—

“Dear Sir,—In consequence of your not meeting me here this evening, I am under the necessity of sending this note by a purpose messenger, to request that you will come over with the bearer, as I am under the necessity of waiting here till you arrive.

“JAMES THOMAS.

“Castle Inn, Brecon, Dec. 2, 1823.”

The plaintiff, being thus pressed by Thomas, went to Brecon the same evening, and had an interview with Thomas.

At this interview Thomas wrote a promissory note, not for 32*l.* 7*s.* 6*d.*, but for 300*l.*, which was dated the 2nd December, 1823, and made payable two months after date, at Sir John Lubbock's, at whose banking-house, ac-

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According to Thomas's own admission, he had no belief or knowledge that the plaintiff had any effects. The plaintiff's statement of what took place at the interview was, that after Thomas had mentioned the dishonour of the note for 32*l.* 7*s.* 6*d.*, he handed to the plaintiff for his signature a note stamp in blank, which the plaintiff signed and handed back to Thomas, who informed him that it was necessary to renew the note for 32*l.* 7*s.* 6*d.*; that Thomas thereupon filled up the note-stamp in his own handwriting for the sum of 300*l.*, without the knowledge or consent of the plaintiff, and without having paid the plaintiff any consideration for it, and without reading it over to the plaintiff, the latter supposing it to be merely a renewed note for 32*l.* 7*s.* 6*d.* On the other hand, Thomas by his answer swore, that he wrote out the note for 300*l.* before he handed it to the plaintiff for his signature, and that the plaintiff himself read the note, though he, Thomas, did not, and that or before or immediately after the plaintiff signed the note, he, Thomas, paid to the plaintiff the full sum of 300*l.* in notes of different Welsh bankers, as the consideration for the note; that this note for 300*l.* was not intended as a substitution for or a renewal of the note for 32*l.* 7*s.* 6*d.*, but was a totally distinct transaction; and that although Thomas proposed to deduct the 32*l.* 7*s.* 6*d.* from the 300*l.*, the plaintiff would not accede to such proposal. It appeared that no witness was present at this interview.

In February, 1824, this note for 300*l.* was dishonoured. It was afterwards taken up by Thomas, who also paid the incidental expenses attending the presentment, &c. The plaintiff's statement was, that he was at that time entirely ignorant of the note for 300*l.*, and received no notice of its dishonour; and that although, as it subsequently appeared, a letter had been written to him on the subject by the bankers, that letter had been retained by Thomas, to whom it had been sent in the first instance, to be for-

warded to the plaintiff. On the other hand, Thomas swore that the plaintiff had received the bankers' letter, and placed it in his, Thomas's, custody, for the purpose of taking it to the bankers', in order to ask them for time to pay it.

On 26th April, 1824, Thomas sent a letter to the plaintiff, in which, without referring to the note for 300*l.*, or any of the circumstances relating to it, he stated that he was in great want of money, and expressed his hope that the plaintiff would remit part of the money, which he alleged that the plaintiff owed him. To this letter the plaintiff, on the 7th May, wrote in reply, that it was not in his power to comply with the request, that he was himself in want of money, and hoped that Thomas would excuse him.

Nothing material took place afterwards between the parties till November 1824. At that time, the defendant, James Thomas, having obtained information that the plaintiff was entitled to two freehold estates, called Llwyncelyn Issa and Cwmodu, various communications took place between him and the plaintiff as to the means of recovering those estates, and the terms upon which Thomas should be employed to recover them. The result of these communications was the following agreement, which was signed by both parties, and duly attested:—

“ Agreement made this 16th of December, 1824, between the Rev. Thomas Jones, of &c., and Mr. James Thomas, attorney, of &c. The said Thomas Jones, in consideration of the natural love and affection which he hath and beareth towards the said James Thomas, and also in consideration of 5*s.* &c., doth hereby agree and engage, upon being required by the said James Thomas, to convey, assign, and assure to the said James Thomas, by a proper conveyance or conveyances, all that messuage, tenement, and lands, with the appurtenances, commonly

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called and known by the name of Llwynceilyn Issa, and also all those four pieces or parcels of land, called Cwmodu, situated in the several parishes of, &c., in the county of Carmarthen; to hold to the said James Thomas, and his heirs and assigns, to such uses, trusts, intents, and purposes as he shall by any deed, will, or writing direct or appoint; and in default of such direction or appointment, to the use of the said James Thomas, his heirs and assigns for ever: and it is hereby agreed, that the said James Thomas shall pay to the said Thomas Jones, within twelve months after the said James Thomas shall have the peaceable possession of all the said premises, the sum of 200*l.*, as a further consideration to the said Thomas Jones, for conveying to the said James Thomas the same hereditaments and premises: the said James Thomas doth further agree to indemnify the said Thomas Jones against the costs and charges of the recovering possession of the said premises, and of the recovery of the rents due from John Williams, the tenant thereof. As witness," &c.

In pursuance of this agreement, the defendant, James Thomas, in May, 1825, commenced an action of ejectment, on behalf of the plaintiff, against the tenant in possession of the Cwmodu estate. The action was tried in August, and the plaintiff obtained a verdict, subject to a special case reserved. About a month before the trial, Thomas, notwithstanding the stipulation in the agreement to the contrary, applied to the plaintiff for money to defray the expenses of the action. The plaintiff being unable and unwilling to advance the money, Thomas urged him to give him his note to the amount of 100*l.*, by way of accommodation; and at the same time promised to provide for it when it should become due. Upon these assurances the plaintiff gave his note at two months, dated the 15th July, for the required sum. It was immediately negotiated by Thomas for value.

After the agreement of the 16th December, 1824, had been executed, the plaintiff was induced to think that the sum of 200*l.*, which Thomas had agreed to pay him for the purchase of the estates, was very much below their real value. The plaintiff therefore, immediately after the verdict had been obtained in the action of ejectment, applied to Thomas to resell to him the estates at the price of 600*l.* This offer was at that time refused by Thomas, on the ground that the price was inadequate, but on the "spontaneous assurance," to use the words of Thomas's answer, "that he, the said complainant, would give such estates to this defendant by his will, this defendant was at last induced to sell the said estates to the said complainant, with that understanding, for 500*l.*" Accordingly, on the 1st September, 1825, the plaintiff, accompanied by the defendant, David Thomas, the brother of James, went to James Thomas's office, and signed the agreement for repurchase. This instrument was drawn up and witnessed by William Rees, a shopkeeper of Llandilo, since deceased, in order, as Thomas stated by his answer, to avoid any imputation that might be cast upon him by the relatives of the plaintiff, if one of his, Thomas's, own clerks drew it up. The purport of this agreement, which bore date the 1st September, 1825, was, that James Thomas thereby agreed to give up all his right and interest in the said estates called Llwynceilyn Issa and Cwmodu, in consideration of 500*l.*, for which the plaintiff had that day given his promissory note; and also in consideration of the plaintiff's paying to Thomas all rent and arrears of rent he might be able to recover from the said estates, or either of them, to the 25th September then instant. At the same time a promissory note was drawn up by William Rees, bearing the same date as the agreement, which the plaintiff signed; and by which he promised to pay to James Thomas, or order, "on the 29th day of November next," the sum of 500*l.*, with interest, &c. The agreement and note, when signed, were delivered to David

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Thomas, to hold in trust for the plaintiff and the other defendant.

Shortly after this transaction the plaintiff applied to James Thomas for a settlement of their mutual accounts, when the plaintiff mentioned the sum of 200*l.* as coming to him under the agreement of the 15th December, 1824. Upon this Thomas denied his liability to pay any part of the sum of 200*l.*, on the ground that it was not payable until a year after he had had peaceable enjoyment of the premises, and also that the agreement of the 1st September, 1825, operated as a forfeiture of the plaintiff's claim to the purchase-money under the agreement of the 16th December, 1824; and that the plaintiff was bound to pay him the whole of the 500*l.*, without deduction. Thomas at the same time (according to the plaintiff's statement, not denied by the answer) pressed for payment of part of the 500*l.*; and upon the plaintiff's saying that, from the state of his circumstances, he could not do so at that time, proposed to borrow the money for the plaintiff, which the latter refused.

On the 9th September, 1825, James Thomas wrote, and sent the following letter to the plaintiff:—

“ Dear Sir,—I have succeeded in getting you the loan of 500*l.* upon the note you gave me, and your depositing the mortgage deeds of Craigbroch; and the person who will advance you the money will give you an acknowledgment of the deeds, and an undertaking to deliver them back to you on payment of the money. This is all you required, and I am glad that I succeeded for you, as I want the money immediately. I shall be at the Castle Inn, Brecon, at about two o'clock to-morrow, to meet you to make the necessary arrangements; and I request that you will be there as near that time as you can, and that you will bring with you all the deeds relating to Craigbroch.

“ I am, dear Sir, yours faithfully,

“ JAMES THOMAS.”

In answer to this letter, the plaintiff sent a note to Thomas, stating that the 500*l.* was not due till the 29th November, by which time he expected to have funds to discharge it, and therefore he declined to raise money at present for that purpose, or to make any mortgage or deposit of the title deeds of Craigybrock.

In consequence of this refusal, James Thomas reminded the plaintiff that the promissory note of the 15th July for 100*l.*, would soon become due, which note, as Thomas swore by his answer, the plaintiff, on the 1st September, 1825, verbally agreed to pay in part discharge of the 500*l.* It did not appear that the plaintiff ever had notice that Thomas had negotiated this note, and according to the plaintiff's own statement, he had not. However that might be, an action was soon afterwards brought against the plaintiff by the holder of the note, Thomas acting as the attorney for the party bringing the action; whereupon the plaintiff, from stress of circumstances, consented to the payment of that note by Thomas, and also to give a fresh note to Thomas for 110*l.*, to cover the amount of the former note, and the costs of the action.

In consequence, as the plaintiff alleged, of the pressing demands of James Thomas for payment of the 500*l.*, and of the importunities of David Thomas to purchase the estates at a price which he represented to be advantageous to the plaintiff, (which demands and importunities were however denied by the defendants), the plaintiff, on the 13th of September, 1825, wrote to David Thomas a letter, requesting him to walk over and value the estates, and also to consider of some means of procuring for the plaintiff a sum of money to pay off the 500*l.* It appeared by David Thomas's answer that he took no notice of this letter as regarded the valuing the estates, but that he applied to one David Williams for a sum of money for the plaintiff, and obtained from him the promise of a loan of

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400*l*. On the 21st November, the plaintiff received the following letter from James Thomas:—

21st November.

“Dear Sir,—I have succeeded in getting you the greatest part of the money you wanted upon your bond, but the person who is to advance it must have my brother David to join you as security. The person alluded to will be here to-morrow, at twelve o'clock, by which time you and my brother are requested to meet him without fail.

“I am, dear Sir, yours respectfully,

“JAMES THOMAS.”

In consequence of this letter, the plaintiff, on the 22nd November, attended at the office of James Thomas, where he met James Thomas and David Williams. The plaintiff was then informed that David Williams could advance only 360*l*.; and the plaintiff accordingly executed a bond to Williams for that sum only; in which bond, David Thomas was named as a surety. The 360*l*. was then handed over by Williams to James Thomas, who indorsed a receipt for that amount on the 500*l*. note; and likewise gave an acknowledgment of the receipt of the 360*l*. to the plaintiff. David Thomas executed the bond a few days afterwards.

No sooner had the transaction of the 22d November been concluded, than the plaintiff received notice from James Thomas that he should require immediate payment of the remainder of the 500*l*.; and although it was arranged that the note for 110*l*. should go in part satisfaction of what was due, yet there remained unpaid the sum of 30*l*., which the plaintiff could not command. That sum, in consequence of an arrangement between the plaintiff and David Thomas, was paid by the latter on the 28th November, when the note for 500*l*. was delivered over to him by James Thomas.

The plaintiff's statement of the transaction between him and David Thomas relative to the 30*l.*, and of the circumstances which followed that transaction, was this; namely, that upon a specific application being made by the plaintiff to David Thomas for the loan of 30*l.*, for the purpose above stated, David Thomas refused to make any advance, unless the plaintiff would enter into an agreement to sell him the estates for 600*l.*, deducting the 30*l.* from the purchase money; and accordingly that the plaintiff, through fear of further legal proceedings by James Thomas, and being in great pecuniary distress, was induced to consent to this arrangement. On the other hand, David Thomas denied by his answer any such specific application or refusal; swearing positively that the plaintiff had continually importuned him to purchase the estates, and that he, David Thomas, ultimately, and with great reluctance, consented to purchase them at 600*l.*, and that after such consent was given, and not before, he agreed to discharge for the plaintiff the sum of 30*l.*, remaining due on the 500*l.* note, and to deduct the same from the purchase-money for the estates.

Under whatever circumstances this arrangement was made, the plaintiff on the day following met David Thomas at his house, and himself (though, as he alleged, by the dictation of David Thomas), wrote out an agreement, and counterpart thereto, in the following terms:

"Agreement made this 29th day of November, 1825, between the Rev. Thomas Jones, of &c., and Mr. David Thomas, of Twerdyrhwy, farmer, &c. [The former part of the agreement purported to convey the estates to David Thomas in fee, in the same terms, *mutatis mutandis*, as were used in the agreement of Dec. 16th, 1824.] "And it is hereby agreed that the said David Thomas shall pay to the said Thomas Jones the sum of 600*l.*, with lawful interest, from the first day the said David Thomas takes possession of the said premises to the day the 600*l.* is paid to the said

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Thomas Jones: the said money is to be paid six months after possession. The said David Thomas doth further agree to indemnify the said Thomas Jones against the costs and law expenses and charges of the recovering possession of the said premises. As witness, &c."

In March, 1826, the special case before referred to having been abandoned, the defendant, James Thomas, was let into possession of the rents and profits of the Cwmodu estates, as the attorney of the plaintiff.

Some time in 1826, the plaintiff being advised that he had been grossly imposed upon by the defendants, refused to make any conveyance of the estates to David Thomas, in pursuance of the agreement of 1825, insisting that that agreement was fraudulent and void. The consequence of this refusal was, that David Thomas (although indebted to the plaintiff in 200*l.* on mortgage) brought an action against the plaintiff to recover the 30*l.* That action was settled by the plaintiff paying the 30*l.* and costs, and the note for 500*l.* was thereupon delivered up to the plaintiff.

In April, 1826, James Thomas brought an action against the plaintiff on the 300*l.* note, and to recover 146*l.* 10*s.* 11*d.* for business done; but on the cause coming on for trial, he submitted to a nonsuit. The reason given by Thomas for the nonsuit was, that one of his witnesses, through ignorance of the English language, gave wrong evidence as to the circumstances under which the sum of 360*l.* was paid to him by David Williams.

The plaintiff now brought his bill against the defendants, James and David Thomas, charging that the note for 330*l.* had been obtained under the fraudulent circumstances before mentioned, and while there was due from James Thomas to the plaintiff the sum of 116*l.* 2*s.* on his promissory note; that the plaintiff had frequently applied to James Thomas to have the 116*l.* 2*s.* set off against what the plaintiff might owe the said James Thomas, but

that his requests had been refused, and that James Thomas had also likewise refused to account with the plaintiff; that these transactions took place while James Thomas acted as the attorney of the plaintiff; that he also took advantage of that situation to obtain from the plaintiff the agreement of the 16th of December, 1824, whereby he purchased the estates at an undervalue; that upon the plaintiff's discovering this fraud, and seeking to repurchase the estates, the two defendants entered into a conspiracy for committing further frauds upon the plaintiff by purchasing his estates at a very inadequate price; that as evidence of such conspiracy, the defendant, David Thomas, after the other defendant had refused to allow the plaintiff to repurchase the estates at 600*l.*, called upon the plaintiff, and stated, that if he would place himself under his, David Thomas's, guidance, there was little doubt that James Thomas might be prevailed upon to resell the estates at 500*l.*, provided the plaintiff would leave them to James Thomas by his will; that under such inducement, as well as under the pressure of circumstances, the plaintiff entered into the agreement of the 1st of September, 1825; and that, ultimately, through the oppression of both defendants, and particularly in consequence of the repeated importunities of David Thomas, the plaintiff entered into the agreement of the 29th of November, 1825. The bill likewise charged that the defendant, James Thomas, had delivered an improper and exorbitant bill of costs, in which he had included charges for business done in the alleged fraudulent transactions.

The bill prayed that the several agreements might be declared fraudulent and void against the plaintiff, and delivered up to be cancelled; that the note of the 1st of September, 1825, for 500*l.*, might be declared to have been obtained from the plaintiff without legal consideration, and the amount thereof, with interest, allowed in account; that the defendant, James Thomas, might be

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restrained from bringing actions on the note for 300*l.* or for his bill of costs, and that that note might be delivered up to be cancelled; and that an account might be taken of what was due from the defendant, James Thomas, for principal and interest in respect of these several transactions, and that he might be decreed to pay the balance, &c.

The defendant, James Thomas, by his answer denied all the charges of fraud and conspiracy contained in the bill, and insisted on the validity of the several agreements. He also denied that, except on one occasion, the plaintiff had ever applied to set off the note for 116*l.* 2*s.*; and he insisted that, as that note was not to be paid without three months' notice, it would not be the subject of set-off as between him and the plaintiff. He stated the circumstances attending the plaintiff's giving the 300*l.* note in the manner already mentioned. He admitted that he had refused to allow the plaintiff the sum of 200*l.* under the first agreement; insisting that such agreement was in that respect annulled by the subsequent agreement of the 1st of September, 1825. He denied that the plaintiff had previously to 1826 uniformly employed him as his attorney, for that on one occasion, in 1825, the plaintiff had employed a Mr. Williams in that capacity.

The defendant David Thomas likewise denied, by his answer, all the charges of fraud and conspiracy contained in the bill. He also positively denied the plaintiff's statement, as to the representations alleged to have been made by him to the plaintiff previously to the transaction of the 1st September, 1825. He positively denied having made any application to the plaintiff for the purchase of his estates, and with respect to the agreement of the 29th November, 1825, he stated as follows:—that he, David Thomas, having heard of the uncertain and wavering disposition of the plaintiff, did, in order to avoid any dispute on the subject, desire the plaintiff, after he had drawn

or written the said agreement and counterpart, and after the execution of both, to consider well what he was doing before he delivered the same to him, David Thomas; as he, David Thomas, cared nothing about the bargain, and would not enter into any agreement with plaintiff, unless the plaintiff meant to perform it. Upon which the plaintiff left the house, and took the agreement and counterpart with him for the purpose, as he, David Thomas believed, of consulting his friends on the subject. That the plaintiff, two or three days after, called again with the agreement and counterpart, and urged him, David Thomas, very strongly to accept the same, which he at last consented to do, and accordingly the counterpart was delivered to him by the plaintiff.

The plaintiff had no witnesses to prove the fraudulent circumstances under which he stated the 300*l.* note to have been given, nor could he give parol evidence of any of the alleged frauds, but he entered into evidence of the value of the estates. James Howard, a maltster and farmer, who had occasionally for the last eleven years valued property in the neighbourhood of the two estates, valued them in December, 1834, at 1110*l.* John Bowen, a land surveyor of thirty-five years' experience, and who had occasionally for the last thirty years valued lands in the neighbourhood of these estates, valued them in January, 1836, at 1131*l.*

The defendants entered into no very material evidence, except to prove the respectability of William Rees, through whose medium the agreement of September 1835 was effected; and also to prove that the plaintiff had on some occasions expressed his satisfaction at the arrangements between him and the defendant, James Thomas, and had talked of making him his heir.

Mr. *Simpkinson*, and Mr. *Roupell*, for the plaintiff.— Enough is admitted on the face of these answers to enable the Court to direct an account; but what the plaintiff is

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most desirous of obtaining, is an inquiry into the circumstances relating to the 300*l.* note. Independently of all considerations drawn from the relation of attorney and client, there would, it is submitted, be sufficient ground of suspicion to induce the Court to direct a special inquiry as to whether any, and, if any, what consideration was paid for this note. But when the situation of the parties is regarded, no doubt can exist on the subject. Here a person under the control of his attorney signs a note for 300*l.*, at a meeting proposed suddenly and for a different purpose, at a time when the attorney was indebted to him in the sum of 116*l.*, which, even taking the attorney's statement to be true, ought to have been made the subject of set-off. The answer of James Thomas on this subject is incredible. Considering the relative situation of the parties, the plaintiff has a right to clear and specific proof, independently of proof of the note itself, that the money was paid to him, and of the circumstances under which it was paid. The general principles on this subject are laid down in *Lewes v. Morgan (a)*, decided in the House of Lords. There Lord *Redesdale*, in giving his judgment, said, that the Master should consider how far the acceptances and bonds executed from time to time by Sir Watkin Lewes to Mr. C. Morgan, were conclusive evidence of the fact, that the several sums of money alleged to have been comprised in the several bonds, constituting 2400*l.*, and for which the bond to that amount was given, were actually advanced; and his lordship added, that when an account has been directed of dealings and transactions of this description, a person standing in the situation of solicitor, agent, general manager and director, and having the whole concerns of the other party under his control, and having made such other party execute instruments of this sort, which are therefore liable to suspicion, is not entitled to rely merely on proof of the instruments themselves,

(a) 5 Price, 83.

but must shew that the advances were actually made. These principles were recognised and acted upon by Lord Chief Baron *Alexander*, in another stage of the same cause (a); and although his decision was subsequently reversed in the House of Lords (b), upon the circumstances of the case, yet the general proposition was fully assented to and adopted by Lord *Brougham*, in his judgment on that occasion. It is clear, therefore, that if that proposition be true, the plaintiff has a right to this inquiry; the *onus probandi* lying on the attorney to shew that consideration was given for the security.

There is no imaginable ground on which any of the alleged purchases can stand. The first agreement, that of December 1824, was made between the attorney and his client, without the intervention of any third party. A court of equity looks at all transactions of this nature, between an attorney and his client, with suspicion. In order to support such a transaction, the attorney must shew that the contract was carried on with perfect fairness, that a full price was given, and that he had, *quoad* the purchase, discarded the character of attorney. Is that the case here? Besides, this agreement is liable to the objection that the client was out of possession. The stipulation was, that an action should be brought to recover the estates, and that the purchaser should indemnify the seller against the costs of the action. This agreement, therefore, is void for maintenance: *Wood v. Downes* (c), *Harrington v. Long* (d), *Prosser v. Edmonds* (e); and the other agreements, which are founded upon them, must be void also. It is impossible to go through this case without seeing fraud in every part of it. The evidence for the plaintiff is explicit as to the real value of the property, and that evidence stands uncontradicted. All

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(a) 3 Y. & J. 248.

(d) 2 M. & K. 590.

(b) 8 Bligh, N. S. 811.

(e) 1 Y. & C. 481.

(c) 18 Ves. 120.

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that is attempted to be said to the contrary is, that it was valued some years ago by another person who, he believes, thought it not worth more than 900*l*. The original agreement was for the purchase of these estates at five times less than their real value. Assuming the construction put by James Thomas on the second agreement to be right—namely, that it put an end to the first, still the question is, whether, under such circumstances, the second agreement can stand. According to his own construction of it, James Thomas was to resell the estates at a profit of 500*l*. and be paid the costs of the action besides. Then as to the agreement with David Thomas, independently of the objection of its being void for maintenance, there is no mutuality in it. Suppose a bill had been filed by the plaintiff against David Thomas, what decree could have been made? There is no time fixed for taking possession or paying the purchase-money. Specific performance could not be decreed, as David Thomas might refuse to take possession, and the purchase-money would not become payable till he did. Under these circumstances, we submit that the plaintiff is entitled to have this agreement, which is a blot on his title, delivered up to be cancelled. The connection between the defendants is evident from many circumstances; but amongst others, from that of James acting as solicitor for David, and attempting to take possession of the estates on his behalf. Upon the whole, these securities, if good at all, can only be good to the extent of the monies actually due. The rest of the monies cannot be considered in the light of gratuities, for the Court will not allow an attorney to take a gratuity from the client, whilst this relation subsists (*a*). [*Alderson, B.*—You do not advert to the relationship of the parties.] That relationship would not contravene the general rule. At all events, it is admitted that the plaintiff was totally ignorant of law.

(*a*) See ante, p. 183, 195.

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Mr. *Metcalf* (a), and Mr. *James Russell*, for the defendants.—The note for 116*l.* 2*s.* was given for good consideration, and bore a special indorsement that it was not to be negotiated till three months' notice had been served on James Thomas for that purpose. So that all the argument as to set-off, there being no legal obligation to pay it till notice, falls to the ground. Again, the argument drawn from the assumption that the note for 300*l.* was given to Thomas without consideration, and while he was the plaintiff's attorney, falls to the ground. This was a specific loan to the plaintiff of 300*l.* in notes; not an allowance in account in the course of mutual dealings between the parties as attorney and client. It is an insulated transaction. There is no evidence whatever to connect the loan of 300*l.* with any transactions between the parties as solicitor and client. In this respect, therefore, it is clear that the plaintiff is not entitled to any relief. [*Alderson*, B.—He only asks for inquiry.] The inquiry must be founded on evidence of fraud, and in a matter of account between an attorney and his client. But fraud is not necessarily to be inferred even where large gratuities have been made to an attorney. A gift to an attorney after the transaction is concluded, though exorbitant, will not be set aside in equity: *Oldham v. Hand* (b). Then, is a bill of costs to be the subject of an account in this court? There is nothing in the dealings between these parties which may not be investigated at law. Upon the subject of the agreements, and the alleged inadequacy of consideration for them, the Court must consider the relationship between the parties. There is strong evidence to shew that the plaintiff intended to make James Thomas his heir, in consideration of his relationship, and his having done much to recover the estate.

(a) Owing to accidental circumstances, *Metcalf* had precedence.

(b) 2 Ves. sen. 259; see ante, p. 170.

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The plaintiff was himself present at the trial of the ejectment, and expressed himself satisfied with the verdict, and talked of remunerating James Thomas for the result. It is in evidence that James Thomas was not present when the plaintiff said this. With all this evidence in favour of the defendants, what is the nature of the plaintiff's case? He brings the foulest charges of fraud and conspiracy against the defendants, without any evidence to support his allegations. He states a variety of transactions, which have no connection with each other even as regards James Thomas; and those transactions, unconnected as they are, he endeavours to combine with matters relating to the other defendant. The relief sought against the two defendants is totally distinct. Unless there had been charges of collusion between them, the bill would have been multifarious, but there is no evidence of any connection between them as agent and employer. The name of David Thomas does not appear in the transactions until September, 1825. [*Alderson*, B.—The first question is, whether there is not ground for relief, as against the defendant, James Thomas. What do you say to the note for 300*l*.? Supposing there is a proper ground for an account, the question is, whether or not there should be an inquiry as to this specific item.] There is no ground for an account in this case. There must be mutual demands to authorize a decree for an account in equity; and matter relating merely to business done or bills of exchange is not considered matter of account. [*Alderson*, B.—Suppose the second agreement is set aside, and the 500*l*. directed to be considered merely as a payment in a series of transactions; how can that be settled except in equity?] An account grounded on such directions must be confined to the particular transaction to which the directions apply. Even if the plaintiff succeed in setting aside that agreement, he will only be entitled to an account in reference to that particular trans-

action; not to a general account of all dealings and transactions. These transactions, however, are not such as a court of equity will set aside. It may be conceded that the arrangements were voluntary, and therefore that the defendants could not enforce the specific performance of them in a court of equity; but there was a near relationship subsisting between the parties, and one of the agreements was drawn up and attested by a person of great respectability, and it is no valid objection to say that the plaintiff entered into a hard bargain. In *Willis v. Jernigan* (a), Lord *Hardwicke* says, that it is not sufficient, to set aside an agreement in this Court, to suggest weakness and indiscretion in one of the parties who was engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him on this footing only, but he must shew fraud in the other party. In *Montesquieu v. Sandys* (b), where the consideration stated was money, but the true consideration was a bill of costs, not equal in amount to the purchase money, the agreement was nevertheless supported.

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Mr. *Simpkinson*, in reply.—The question is, whether the facts disclosed by the answers are not sufficient in themselves to prove the fraud. It is enough to say that this man was solicitor to the plaintiff; that while he was so, the plaintiff agreed for the sale to him of these estates for 200*l.* and the costs of the ejectment; that a few months afterwards he was driven to get back the premises from his attorney under circumstances which no court of justice will warrant; that he was compelled to pay for the privilege of repurchasing them, and even obliged to borrow the odd 30*l.* to make up the consideration money. [*Alderson*, B.—There is no doubt as to that part of the case;

(a) 2 Atk. 251.

(b) 18 Ves. 302.

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the questions as to the account and the situation of David Thomas are more material.] Upon the question of account, it is impossible to say that a bill will not lie in equity to have an agreement obtained from a party under these circumstances declared null and void, and to have the money paid under the agreement replaced. Now, if such a bill were filed against the defendant in respect of one of these agreements, he might say in his defence—Be the case what it may under the agreement, yet there are other transactions in which the plaintiff is indebted to me, and I must have credit in account with him. If it be clear that such would be the result upon a bill so framed, it follows that the present bill, which is for a general account, is maintainable. Courts of equity will not administer justice by halves. They would say, in a case like the present—these dealings, taken *per se*, clearly authorize a decree for an account in each case; therefore let all the accounts of all the dealings be gone into.

With respect to David Thomas, he unquestionably stands in a different situation from his brother, but he is so mixed up in the transactions that he is a necessary party to this suit. In the first place, he admits by his answer, that the agreement of the 1st of September, 1825, is in his possession, and he holds it in trust for his brother, and refuses to deliver it up to the plaintiff. He is, therefore, a necessary party to a bill which seeks the delivery up and cancelment of that agreement. He has likewise so conducted himself in these matters as to bring himself, to a degree, within the principles which regulate the dealings between attorney and client; for it appears by the evidence of the defendants, who defend together, that the application to Williams for the loan of 360*l.* was made by David Thomas, and although he was not personally present at the meeting, in September 1825, yet that meeting took place a few days only after the procuring this loan.

It has been said that this bill is multifarious; but objections for multifariousness cannot be taken at the hearing: *Wynne v. Callendar* (a).

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ALDERSON, B.—The only questions in this case which have presented any doubt to my mind, are those which have been raised with respect to the account, and to the relief prayed against the defendant David Thomas.

It appears to me that I ought, upon the whole, to make a decree for an account as prayed, upon the ground that these transactions having taken place between attorney and client, cannot be supported in equity, and therefore that a general account must follow from the nature of those transactions. I agree with the proposition that not every transaction in the nature of a purchase, which takes place between an attorney and his client, is void, by reason of the relation which subsists between the one party and the other. If the transaction be entirely unconnected with the duty of the attorney, and the attorney act with fairness, no doubt such a transaction may be supported. That was the case of *Montesquieu v. Sandys*. The decision in that case proceeded on the ground that the party against whom the contract was sought to be annulled, although he was the attorney of the plaintiff, had not acted as such attorney *in hac re*. But in *Wells v. Middleton*, which is cited by Lord Eldon in the case of *Wood v. Downes* (b), the transaction was set aside, although it would have been unobjectionable but for the relation in which the parties stood to each other as attorney and client. "It was overturned," said Lord Eldon, "on this great principle—the danger from the influence of attorneys or counsel over clients, while having the care of their property; and, whatever mischief may arise in particular cases, the law, with the view of preventing public mischief,

(a) 1 Russ. 293.

(b) 18 Ves. 127.

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says, they shall take no benefit derived under such circumstances." It appears, therefore, that even a fair transaction of this nature, between an attorney and his client, in a matter entrusted to the attorney in his character of attorney, may be set aside, in order to prevent the public inconvenience that would arise, if professional men, though not, individually speaking, intending to act unfairly, were to be allowed to avail themselves of their peculiar situation to enter into such transactions.

The question, therefore, in cases like the present, is, whether the party was, as Lord *Eldon* expresses it, the attorney *in hac re*. Now, what are the circumstances of this case? The defendant, James Thomas, is employed by the plaintiff as his attorney to recover the possession of these estates; and while he was so employed, a bargain is entered into between him and his client, that he shall have possession of the estates delivered to him upon his giving an indemnity to the client from the costs of recovering the possession, and that the contract shall be completed upon his paying to the client 200*l.*, at a certain time after the delivery of possession. What is that but a bargain between an attorney and his client *in hac re*—a bargain which cannot stand in a court of equity, and is contrary to public policy?

I own I think that the case goes a great deal further, upon the mere statements of the answer, and that the client has abundant reason to say that he has been deceived in these transactions, and that the attorney is not prepared to clear up these charges of deceit, either as regards the transaction of 1824, or as regards that of 1825. The latter is infinitely more fraudulent than the other, and may be set aside on other principles. How stands the case with reference to that agreement? The attorney having obtained from his client an illegal agreement for the purchase of these estates, the client brings his action of ejectment for the recovery of those

estates, and obtains a verdict. The client, then, suspecting that he has been deceived, is induced to seek for a modification of that agreement; upon which, what does the attorney do? He enters into a fresh bargain with his client; he refuses to give up the former agreement, but makes the client pay for nothing, in order to put an end to the illegality of that agreement. This second agreement, therefore, must also be set aside, and the account which is asked for follows as a matter of course.

I say nothing here relative to the note for 300*l.*, because that will be the subject of an inquiry before the Master. In taking the account, the Master will inquire under what circumstances that note was given. If it appear to have been given in a fair transaction, the attorney ought to have the benefit of it; but he ought not to have the privilege of recovering that as an item in the account in equity. With respect to the note for 500*l.*, as the agreement for which it was given is declared to be null and void, it appears to me that the amount of that note, together with interest, must be repaid by the defendant, James Thomas.

The only remaining question is, what is to be the nature of the decree in reference to the defendant, David Thomas. Upon the whole, I think that the circumstances shew that a considerable connexion existed between him and his brother in these transactions, and that I shall do right if I decree that he also deliver up the agreement of the 29th of November 1825, for the purpose of being cancelled.

Declare all the agreements fraudulent and void, and let the same be delivered up to the plaintiff to be cancelled. Refer it to the Master to take an account of the dealings and transactions between the defendant James Thomas and the plaintiff, and, in

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taking such account, let the Master charge the defendant James Thomas with the amount of his note for 500*l.*, with interest from the time of payment. Let the Master inquire whether anything, and what, is due to the defendant James Thomas, on the note for 300*l.*, dated the 3rd December, 1823, and let the Master state whether the defendant James Thomas can prove by any and what affirmative evidence, beyond the production of the note itself, the payment of any and what consideration to the plaintiff for that note. The Master to tax the bill of costs of the defendant James Thomas. Liberty to state special circumstances. Reserve further directions and costs.

37 - 20. 690.
Hans. 22.

Ex parte, TRAFFORD—In the Matter of the LIVERPOOL
AND MANCHESTER RAILWAY ACT.

Where, under the provisions of a railway act, lands are purchased by the company of corporations, tenants for life, &c., the costs of an application to the Court to have the purchase money applied in the discharge of incumbrances, will be directed to be paid by the Company, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses.

THE petitioner Thomas Joseph Trafford was, by virtue of his marriage settlement, tenant for life of considerable estates in the parish of Trafford and elsewhere, in the county of Lancaster, subject to a term of five hundred years, for securing portions for his brother and sisters. The trustees of that term, having borrowed several sums amounting to 666*l.* 13*s.* 4*d.*, for the purposes of the settlement, mortgaged the premises comprised in the term to secure the repayment of that sum.

By the statute 7 *Geo.* 4, c. xlix. s. 39 (a), the Manchester and Liverpool Railway Company are empowered to purchase lands, tenements, and hereditaments for the pur-

to be settled to the like uses.

(a) This act is amended and enlarged by stat. 10 *Geo.* 4, c. xxxv.

poses of that undertaking, of corporations, tenants in life, tenants in tail, &c.

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Under the 61st section of the act, the money to be paid for the purchase of any lands, &c. of any corporation, tenant for life, &c., shall, if it exceed 200*l.*, be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, according to the provisions of the statute 1 *Geo.* 4, c. 35, there to remain until the same shall, by the order of the Court of Exchequer, made upon the petition of the party who would have been entitled to the rents and profits of the lands to be purchased, be applied either in the purchase or redemption of the land tax, or in the discharge of any debt or other incumbrance affecting the said lands, or affecting other lands standing settled to the same uses; or until the same shall by a like order be laid out in the purchase of other lands to be settled to the like uses, as the lands which shall be so purchased stood settled or limited; and in the meantime the money may by like order of the Court be invested in the 3*l.* per cent. Reduced Annuities, &c.

The 66th section enacts, that where, by reason of any disability or incapacity of any party entitled to the lands &c. to be taken by the Company, the purchase-money shall be required to be paid into the Bank of England, to be applied in the purchase of other lands, to be settled to the like uses, it shall be lawful for the Court to order the expenses of such purchases, together with the necessary costs and charges of obtaining such order, to be paid by the Company out of the monies to be received by virtue of the act.

The petitioner having sold some part of the settled lands to the Company under the provisions of this act, the Company paid the purchase-money, amounting to 2166*l.*, into the Bank of England, where the same

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was now standing in the name of the Accountant-General.

The mortgagee of the term for five hundred years having consented to receive the above-mentioned sum of 2166*l.* in part discharge of his mortgage debt of 6666*l.* 13*s.* 4*d.*, the prayer of the petition was, that the Accountant-General might be directed to pay over to him that sum, and that the Company might be ordered to pay the expenses of this petition, together with the necessary costs and charges of obtaining the order to be made on this petition, and of the other parties appearing.

Mr. *Stinton*, for the petition, said, that although the express words of the 66th section, relative to costs, were confined to cases where the money was to be laid out in lands to be settled to the like uses, yet it was clearly within the scope and meaning of that section, that the same costs should be given in cases where the money was to be applied in the discharge of incumbrances : and he cited *Ex parte Northwick (a)*.

Mr. *R. Atkinson*, for the mortgagee.

Mr. *Spence*, for the Company.

The LORD CHIEF BARON said, that however desirous he might be to order the costs prayed for, he doubted whether, under the words of the act of Parliament, he had authority to do so. He fully agreed with Lord *Lyndhurst*, that cases of this nature came within the spirit of the act ; but he thought that that consideration alone, without stronger expressions on the part of the Legislature, would hardly authorize him to make such an order. He would, however, reserve the question of costs,

(a) 1 Y. & C. 166.

and would, in the mean time, mention the subject to Lord *Lyndhurst*.

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On a subsequent day, Mr. *Stinton* applied for the judgment of the Court upon the point reserved, when the *Lord Chief Baron* stated, that he had consulted Lord *Lyndhurst* on the subject, and that he should follow the decision in *Ex parte Northwick*. His Lordship therefore ordered that the costs, as prayed by the petition, and likewise the costs of this application, should be paid by the Company.

THOMAS v. THE ATTORNEY-GENERAL.

Feb. 9th.

JANE LAWRENCE, by her will, after reciting certain powers of appointment which she possessed by virtue of her marriage settlement and other indentures, directed, limited, and appointed all her real and personal estate, whatsoever and wheresoever, to the only use and behoof of her husband, Henry Lawrence, for life, subject to the payment of her debts, which she directed to be paid by her husband, whom she appointed her executor. She then gave annuities to certain charitable societies; the interest of 100*l.* to her nephew, T. Morgan, for his life; and legacies to various persons—"the legacies to be paid by my husband as soon after my death as convenient, or within three years, if it suit the convenience of my said beloved husband." The testatrix then charged all her real estate with the payment of her debts and legacies; and gave her husband power, by sale or mortgage of any part of her property, to raise and levy the requisite sums for that purpose.

Testatrix gave several legacies, and directed her husband, whom she appointed her executor, to pay the legacies as soon after her death as might be convenient, or within three years, if it should suit his convenience: *Held*, that the legatees were not entitled to interest on their legacies before the expiration of the three years.

Where lands are charged by will with the payment of debts and legacies, and the executor has power to raise money for that purpose by the

The testatrix died, leaving her husband surviving her,

sale or mortgage of all or any of the testator's real estates, this is not a discretion which can be exercised arbitrarily or capriciously by the executor.

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who had not paid the legacies before the end of three years after the testatrix's death. The bill was filed by the legatees against the Attorney-General, in respect of the charity legacies, and against the husband and the heir-at-law of the testatrix, praying to have the trusts of the will declared and carried into execution.

Mr. *Boteler*, and Mr. *Berkeley*, for the plaintiffs.—The Court will give interest on these legacies from the usual time, otherwise the legatees will suffer from the neglect of others. As far as T. Morgan's interest is concerned, it is clearly one which ought to commence from the time of the decease of the testatrix. With respect to the other legatees, although they could not compel payment for three years after the death of the testatrix, yet it does not follow that they ought not to have interest from the usual time. In *Churchill v. Lady Speake* (a), a case somewhat similar to the present, interest was given from the death. The charity legacies, except such as are charged on the personalty, are manifestly void.

Mr. *Wray*, for the Attorney-General.

Mr. *Stevens*, for the heir-at-law.

Mr. *Simpkinson*, and Mr. *Wilbraham*, for the defendant Henry Lawrence.—If the husband had paid the legacies before the end of the three years, the interest would also have been payable before the expiration of that time. But he was to pay the legacies at his convenience, and three years is the time limited for his convenience. There is no reason, therefore, why interest should be paid from an earlier period. The rule as to payment of interest from the end of one year, is nothing more than a rule of

(a) 1 Vern. 251.

convenience. As to T. Morgan's interest, it is nothing more than an ordinary legacy, and must be treated accordingly. There is another question in the suit, namely, whether, as the husband has a right to sell or mortgage all or any part of the real estates, he has an arbitrary discretion to say on what part of the estates the charges shall be thrown; but upon that point we offer no argument.

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ALDERSON, B.—I think that the interest on these legacies should only be calculated from the end of the three years. The testatrix intended to give her husband an extension of that discretion, which courts of equity have limited to one year; and, the discretion having been given to him, it appears that it was not convenient to him to exercise it earlier. As to the bequest to T. Morgan, it is not in the nature of an annuity, but of an ordinary legacy, and therefore payable only at the same time with the other legacies.

I think also that the discretion given to the husband throughout this will is to be taken to be a sound discretion, and not merely the exercise of an arbitrary or capricious choice; therefore, upon the question what part of this property is to be sold for the purpose of the will, I can only say that I think it must be such part as a sound discretion points out for that purpose.

CREASE v. PENFRASE.

MR. FAVELL moved for the production of the deeds and documents, admitted by the answer of the defendant to be in his possession.

Deeds and documents admitted by the answer being very numerous, the usual order for their production may be qualified

Mr. Collyer, for the defendant, stated, that the deeds

by a direction that they be inspected, &c. at the office of the defendant's attorney.

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and documents were so numerous that it would be impossible without great inconvenience to remove them into the custody of the defendant's clerk in court; and he submitted, that under such circumstances the usual order should be qualified by a direction, that the plaintiff or his solicitor should be at liberty to attend, at all seasonable hours, at the office of the defendant's solicitor, for the purpose of examining and taking copies of the documents.

THE COURT, after hearing Mr. *Favell* in reply, made the qualified order.

MEMORANDUM:

ON the 2nd March, 1837, *John Jervis*, Esq. of the Middle Temple, received a patent of precedence; and soon afterwards, *Francis Whitmarsh*, of Gray's Inn, Esq., and *Charles Purton Cooper*, of Lincoln's Inn, Esq., were appointed his Majesty's counsel learned in the law.

Ex parte ELLISON—In the Matter of the TRINITY HOUSE CORPORATION ACT.

May 2nd.

A lease of a light-house and the tolls thereof, by the Corporation of Trinity House, is a chattel real, and therefore a husband may assign his wife's interest in such a lease.

Where an act of parliament authorizes the purchase of lands in which a feme covert is interested, and gives the Court of Exchequer authority to distribute the purchase-money amongst the parties beneficially entitled thereto, the exercise of that authority by the Court is in lieu of the solemnities ordinarily required for the conveyance of the real property of a feme covert, or on the payment of her money out of Court.

BY indenture of lease, dated 1st October, 1795, and executed by the master, wardens, and assistants of the Trinity House of the one part, and Henry Smith of the other part, reciting letters patent empowering the Trinity House to give authority to persons to erect light-houses, and reciting the convenience which had been afforded to mariners by the erection of the Longships light-house; and that Smith had erected the same, and had also caused certain poles or trees to be placed on the neighbouring rock, called the Wolf Rock, or Rundle Stone; it was

witnessed, that, in consideration of such erection by Smith, and other considerations in the indenture mentioned, the parties thereto of the first part did demise unto the said Henry Smith, his executors, administrators, and assigns, the said light-house, together with the scite thereof, and also the said poles or trees, and all tolls, dues, and customs payable in respect of the said light-house, to hold, &c., for the term of fifty years, from the 29th September, 1795, at the rent of 100*l.* per annum. The lease contained clauses, that the actions to be brought by the lessee should be in the name of the corporation, and that the lessee should not assign without leave of the corporation.

Henry Smith died intestate on the 24th of October, 1809, leaving a widow and four children. By Smith's intestacy, and the will of the widow, who died some few years afterwards, the four children became entitled to the lease in equal shares.

In July, 1829, Captain Ellison married Betsy Ellen Smith, one of the four children of Henry Smith. No settlement was made upon that marriage. Afterwards Captain Ellison granted an annuity, chargeable on his one-fourth share of this leasehold property, to George Key, who subsequently assigned it to T. Kearsey. Upon the assignment to Kearsey, the latter advanced a further sum, and the whole annuity then amounted to 140*l.* per annum. This annuity was secured by a deed, dated the 27th of February, 1830, and executed by Captain and Mrs. Ellison, by which the annuity was made payable during the remainder of the term, and made redeemable in the usual manner.

By an indenture dated the 21st of August, 1830, Captain Ellison assigned his interest in the light-house, subject to existing incumbrances, to the petitioners, Mears and Hughes, upon trust, to pay an annuity of 300*l.* a year during the remainder of the term, to Mrs. Ellison, for her separate use, but without power of anticipation, and to pay the residue to Captain Ellison.

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By the statute 6 & 7 *Will.* 4, c. 79, which vests the property in all light-houses in England in the Trinity House, and which recites, amongst other things, that the Longships light-house is held by Henry Pascoe Smith, Esq., (the administrator of Henry Smith, the intestate), by virtue of a lease from the Trinity House, that corporation (see sect. 3) is empowered to purchase several light-houses, amongst which is the Longships, and the tolls belonging to them, of the owners or persons interested in those light-houses.

The 23rd section directs that the purchase-money paid for any light-house to be purchased of corporations, *femes covert*, infants, &c., shall, if it exceed 200*l.*, be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account there "*Ex parte* the Corporation of the Trinity House," &c. ; to be applied under the direction of the Court, and upon the petition of the party who would have been interested in the rents, in the purchase of hereditaments to be conveyed to the like uses to which the light-house stood limited, and in the meantime to be invested in the 3*l.* per cent. Reduced Annuities.

The 26th section enacts, that in case any person to whom any purchase-money shall be awarded for a light-house shall refuse to accept the same, or shall not be able to make a good title to such light-house, to the satisfaction of the master, wardens, and assistants of the Trinity House, they may order the sum assessed and awarded to be paid into the Bank of England, in the name of the Accountant-General of the Court of Exchequer, to the credit of the master, wardens, and assistants of the Trinity House, and the parties interested, subject to the order of the Court; and the Court, upon the application of the parties interested, may, in a summary manner, order the money to be invested in the public funds, and may order distribution thereof, or payment of the dividends thereof, according to the respective estates or

interests of the parties making claim thereto, and may make such other order in the premises as to the said Court shall seem just.

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The 27th section enacts, that where any question shall arise respecting the title of any party to any money paid into the Bank in pursuance of this act, the party who shall have been in possession of the light-house, or in receipt of the tolls, at the time when the purchase-money was awarded, shall be taken to have complete title thereto, according to such possession and enjoyment, till the contrary be shewn to the satisfaction of the Court of Exchequer.

Under the provisions of this act, the corporation of the Trinity House entered into an agreement with Captain Ellison for the purchase of his remaining interest in the property at 6899*l.* 6*s.* 7*d.*, the corporation taking upon themselves the responsibility of discharging the several incumbrances. Accordingly, an indenture of assignment was prepared for that purpose, bearing date the 8th of March, 1837, and executed by the proper parties. The corporation, about the same time, undertook to re-purchase Kearsey's annuity at the sum of 1,540*l.*, and an agreement was executed for that purpose.

A doubt having afterwards been suggested whether Captain Ellison could make a good title to the property, the purchasers paid the purchase-money into Court, under the 26th section of the act. The ground of their objection was, that the interest of the parties holding under this lease was not that of a chattel real, but a chose in action, or a mere personal interest vested in Mrs. Ellison during the term, and that it was not assignable by her husband.

A petition was now presented by Captain Ellison and the trustees under the marriage settlement, praying that a sum of 3000*l.*, part of the sum of 6689*l.* 6*s.* 7*d.*, might be paid to the trustees, for the purpose of securing Mrs.

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Ellison's annuity during the remainder of the term, and that the residue might be paid to Captain Ellison, and that the Trinity House might be ordered to pay the costs of this application.

Mr. *Simpkinson*, and Mr. *Pigott*, for the petitioners.—If this were a mere personal annuity, it may be admitted that this assignment would not be good against Mrs. Ellison if she survived her husband. But this is a lease of the light-house, of the scite, and of the tolls, for a term of years, which is clearly an interest in land, and is so treated by the act, because the purchase-money is to be re-invested in land. In *Negus v. Coulter* (a), the mere right of laying mooring-chains and exacting tolls for them, was held to be an interest in land. *Knapp v. Williams* (b), *Howes v. Chapman* (c), *Rex v. Bates* (d), and *Rex v. Winstanley* (e), are likewise authorities in point. The case of *The Chelsea Water Works Company* (f) went upon this,—that though the right of the corporation was an interest in land, yet the individual shares were personal. That case, therefore, is not an authority against the present application. In the cases in which it has been held that the tolls of a light-house are not rateable, the reason has been, that the tolls are not collected within the parish where the benefit is received—not that those tolls are not as much connected with the realty as any other tolls: *Rex v. Rebowe* (g), *Rex v. Coke* (h). Supposing this to be a real chattel, it is clear that the assignments of it by Captain Ellison, first to Kearsey, and secondly to the trustees for the benefit of his wife, are valid. In *Donne v. Hart* (i), it was held that

- (a) Ambler, 367.
- (b) 4 Ves. 430.
- (c) 4 Ves. 542.
- (d) 3 Price, 341.
- (e) 8 Price, 180.
- (f) Ante, p. 268.

- (g) Cowp. 583; Bott, 142, pl. 177.
- (h) 5 B. & C. 797; 8 D. & R. 666.
- (i) 2 Russ. & Myl. 360; see *Moody v. Matthews*, 7 Ves. 183.

an assignment by the husband of his wife's interest in a chattel real was valid, although the interest was only contingent and reversionary, and although the husband died before the contingency was determined or the reversion fell into possession. But, supposing this were not a chattel real, the money is in Court, and represents the property; and the Court, having the fund in its possession, can give all necessary directions for securing the wife's interest.

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Mr. Boteler, and Mr. L. Wigram, for the corporation of the Trinity House.—It is not the object of the Trinity House to throw obstacles in the way of the petitioners, but only to secure a good title to this property. In the cases which have been cited, the nature of the property was that it should be assignable; the difference here is, that the interest originally granted to the Trinity House was not assignable. A confidence was reposed in them not to assign, and the contract between them and Smith amounted to nothing more than a covenant that Smith, in consideration of building the light-house, should enjoy the tolls. The recital in the stat. 13 *Eliz.* c. 8, shews that peculiar confidence was placed in the Trinity House, on the ground of their being “the chiefest and most expert masters and governors of ships.” The third section of that statute enacts, “that the corporation shall from time to time keep in repair the beacons, &c. to be by them or their assigns erected.” The word “assigns” in this clause, when taken with reference to the entire statute, means nothing more than “agents.” And that seems to be the meaning attached to the same word in the charter, by which many of the rights specified are granted to the master, wardens, and assistants of the Trinity House and their successors, “or their substitutes or substitute, deputies or deputy, assigns or assign.” That the corporation had a trust or confidence imposed upon them, which they

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could not assign, appears likewise from the opinion of Sir *F. Bacon*, A. G., and Sir *H. Yelverton*, both of whom were consulted upon the subject. The lease to Smith also bears out this construction, for it contains a covenant that the actions to be brought on behalf of Smith shall be brought in the name of the corporation. *Rex v. Tyne-mouth* (a) favours the position that the tolls are distinct from the light-house. [The *Lord Chief Baron*.—There is a great series of modern cases, at variance with that opinion.] Even if the tolls be considered real property under the statute of Elizabeth, it does not follow that they are so for other purposes. They are not annexed to the realty like mooring chains, but are merely a tax for using the realty. There is no difference in this respect between them and postage. There are many cases in which property has been considered to be real property within the Mortmain Act, though not so for any other purpose. A large and full construction has been given to the Mortmain Act, in order to prevent the mischiefs intended to be provided for. The same observation may apply to the statute of Elizabeth. [The *Lord Chief Baron*.—The question is, whether, under the 26th section of 6 & 7 Will. 4, c. 79, this money is not tantamount to money in Court arising from the sale of an interest of a feme covert, and paid on her personal appearance, or by virtue of a deed of acknowledgment.]

Mr. *Simpkinson*, in reply, contended in favour of the construction put by the Court upon the 26th section of the statute of *Will. 4*, and also remarked that the Trinity House had themselves considered this property as assignable, because the assignments contained express covenants by the lessee, not to assign without the consent of the corporation.

(a) 12 East, 46.

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THE LORD CHIEF BARON.—I do not blame the Trinity House for bringing this question before the Court, as it might fairly be considered the safest course for them, under the circumstances; but I own I do not see any doubt sufficient to justify me in withholding the order which is sought by this petition. It is true that the tolls of a light-house have been held not to be rateable as tolls; but it does not therefore follow, that in a lease of a light-house together with the tolls, the tolls are not to be drawn after the light-house as a species of real property. That is one answer to the objections which have been made to this motion. Then, again, it is impossible to consider this property as a mere personal enjoyment of a right which has been vested in the Trinity House by way of confidence, and which they cannot assign; because they have themselves treated the property as matter of contract, and have by the form of their own contracts permitted the parties, with certain restrictions, to make assignments. Then, with respect to the interest of this particular party, I think the act of parliament expressly permits the Trinity House to purchase it. Although Captain Ellison may, independently of the act, have no right to assign his wife's interest except under certain forms; yet, as the act has made a complete title for the purchasers, what is that but giving the sellers the power of converting their interest into hard cash? That cuts the Gordian knot. What has the Court to do but to allow the parties to apportion the money amongst them according to the interests which they had before? The difficulty is solved by the act. Suppose, as has been suggested, that this was a mere covenant that the party should enjoy the tolls; the legislature only says—We will allow you to convert your interest into a sum of money, which the Court shall pay to you. And if so converted, it is his personal property. In the present case, whatever was the nature of Captain Ellison's interest, by the act of Parliament it is converted into money, and is

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therefore his personal property. By his own personal engagement, he would be bound to settle such part as is the subject of settlement.

I should be disposed to let the matter rest here, and to dispose of this case simply upon the construction of the act of Parliament; but being much pressed to give my opinion upon the other point which has been raised, I must say, that in my opinion the lease of these tolls is a chattel real, and that, consistently with modern decisions, that old case of *Rebowe*, if all the grounds on which it appears to have been decided are correctly reported, was not altogether put upon the right grounds.

Motion granted.



Ex parte ATKINS—In the Matter of the LONDON and SOUTHAMPTON RAILWAY ACT.

May 2nd.

A wife in *extremis*, and having just been delivered of a child, appointed by will real property to her husband, in fee. After her death, the husband gave his bond for securing 3000*l.* to the infant; which bond recited that he had upon the execution of the will given his wife an assurance that he would make provision for the child:—*Held*, that the 3000*l.* was a lien on the estate.

MARIA GODFREY, being seised in fee of a one undivided third part of some freehold lands at Southampton, married Mr. Bradby. After their marriage, the lands were settled upon her and her husband for their lives, with remainder to such uses as she should by deed or will appoint; in default of appointment, to the use, after the death of the husband, of the children of the marriage in fee; and, in default of children, to the right heirs of Mrs. Bradby.

A few years after the marriage, and immediately after being delivered of a daughter, Mrs. Bradby made her will. She was too weak to sign it, but she set her mark to it in the presence of her solicitor, her nurse, and a female friend. By this, she devised the whole of her one third share to her husband in fee. She died on the same day, leaving one child only, the daughter before mentioned.

In February, 1824, Mr. Bradby executed a bond to certain trustees, conditioned for securing to Louisa Bradby, the infant daughter of himself and his late wife, the sum

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of 3,000*l.*, to be paid to her immediately upon her attaining twenty-one, if that event should happen in his lifetime; if not, within six months after his decease. The bond, after reciting that Bradby was entitled to a one undivided third share of the property in question under the will of Mrs. Bradby's father, and by virtue of Mrs. Bradby's will and appointment, proceeded in these words: "And whereas the said J. Bradby, upon the execution of the said will and appointment, gave his said wife an assurance that he would make a provision for the said Louisa Bradby, and hath therefore agreed to enter into the said bond, &c. Now the condition, &c."

After the execution of this bond, Mr. Bradby purchased the remaining two thirds of the property, and mortgaged the whole to the petitioners. Bradby afterwards, with the consent of the mortgagees, contracted with the Southampton Railway Company for the sale to them of the whole property for 4,500*l.* But upon ascertaining the nature of the bond, the company refused to pay more than two thirds of the purchase money to the vendor; and they paid the remaining one third, namely, 1,500*l.*, into court, upon the advice that the recital in the bond gave the trustees a lien for that sum upon the one third share devised by Mrs. Bradby.

The mortgagees now presented their petition to be paid the 1,500*l.*

Mr. Coote and Mr. *L. Wigram*, for the petitioners.—Mr. Bradby in his affidavit states, that the assurance mentioned in the bond was merely voluntary on his part. [The Lord Chief Baron.—I cannot hear his affidavit as to that. His evidence must be taken from the recital only.] Where it is shewn that a party has received a benefit in consequence of a promise made, and he afterwards refuses to perform the promise, the Court will convert him into a trustee, and make him perform the promise. But here

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there is no evidence that the husband received the benefit of the wife's will, in consequence of the promise. It must be shewn not merely that the promise was made, but that it was relied upon by the testator: *Chamberlain v. Agar* (a). The case of *Podmore v. Gunning* (b), will be relied upon against the petitioners; but that case went a great length, and the decision, as reported, is only on motion. It is believed that the bill, in that case, was dismissed (c). A mere promise amounts to nothing. Here it was only an assurance by the husband, that he would make a suitable provision for the child; and he did so by bond. There was no promise to pay out of this particular land. [The *Lord Chief Baron*.—If a man makes a will, and then marries and has a child, that is in law a revocation of the will, with a view to the benefit of the children. Here the very reverse takes place. A woman marries, has a child, and then makes a will. The law would consider *prima facie* that that would be for the benefit of the child. Instead, however, of giving the property to her child, she gives it to her husband. How did it occur to her to make a will for her husband?]

Mr. Wilcock, for the trustees.—This transaction was one and entire. The bond might be a proper form of provision for the child, but clearly the father thought himself bound to execute it in consequence of benefits which he received under the will. *Podmore v. Gunning* is in point, and is a very strong case. When Bradby has paid the money, I admit he would be entitled to the estate; but the Court will not let him have the estate till he has paid the purchase money. There must be an investment of the money, or he must do what the Court may consider an equivalent. He has shewn that in his opinion not less than 3,000*l.* ought to be settled on the child.

(a) 2 Ves. & B. 259.

(b) 5 Sim. 485. *see also* *Bradby*

(c) It was so. The case has since been reported in 1 Sim. 644.

The 1,500*l.* ought to be applied in part performance of the settlement.

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Mr. *Cory*, for the husband, now offered to make proposals before the Master for settling 3,000*l.* on the infant.

The LORD CHIEF BARON said, that, considering the value of the estate, he thought the proposal fair; and ordered a reference to the Master to approve of a security upon the terms of the bond; and upon that security being given, the money in court to be paid to the mortgagees.

See heads & details in 4 vol. 17 p. 100. & see in same volume 58.

GOULBOURN v. BROOKS.

May 9th,
24th.

GEORGE BROOKS, by his will, devised as follows:—

"I give, devise, and bequeath all my real estate to my executors upon the trusts after mentioned, that is to say, upon trust, that my wife, Mary Brooks, do and shall receive and take my rents during her natural life, if she shall so long continue my widow; and from and immediately after her death or marriage, which shall first happen, then upon trust to pay and apply the rents and profits in the maintenance and bringing up of my son Thomas Brooks, and my daughter Ellen Brooks, if they shall be under age, until they shall attain the age of twenty-one; and then my will and mind is, that at the death or marriage of my said wife, I give and devise my estate above mentioned to my son Thomas Brooks, and the heirs of his body, only yielding and paying to my daughters Martha and Ellen the sum of 100*l.* each."

Legacy charged on real estate, and payable on the brother and sister of the legatee attaining the age of 21, held not to have lapsed by the death of the legatee, before the time of payment; the payment being postponed for the convenience of the estate, and not as a condition annexed to the person of the legatee.

The testator died, leaving his widow and three children, namely, Martha, Thomas, and Ellen, surviving him. Martha had attained her age in the lifetime of the testator, and married the plaintiff. The widow married again; and in 1831, which was after the marriage of the widow,

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but before the two children Thomas and Ellen attained twenty-one, Martha died. The question was, whether the legacy of 100*l.* left to Martha lapsed, or was payable to the plaintiff as administrator of Martha, out of the real estate.

Mr. *Bethell*, and Mr. *Dixon*, for the plaintiff.—This is a devise to the wife until her death or second marriage, and then a chattel interest is provided for the maintenance of the two children, if under age at that time; and, subject to that intermediate interest, the estate is to vest in Thomas Brooks in tail, subject to the legacies to Martha and Ellen. The interest in these legacies is vested, but payment postponed for the convenience of providing for the childrens' maintenance. The legacies being charges on the remainder in tail, and the interest in remainder vesting, the charge is vested also. It was held in the earlier cases (*a*), that where a legacy is charged on land, and the legatee dies before the time of payment, the legacy is lapsed. That rule applies now, where payment of the legacy is postponed with reference to the circumstances of the devisee, but not where it is postponed with reference to the circumstances of the estate: *Dawson v. Killett* (*b*), *Poole v. Terry* (*c*). When a legacy is charged upon an estate as a portion for a child, and the child dies before the time of payment, the general rule is that the estate is relieved from the portion. But the reason for that rule fails in this instance, because the plaintiff's wife was married at the time of the gift: *Emes v. Hancock* (*d*).

Mr. *Spence*, and Mr. *Harwood*, for the defendant.—The estate is given, in the first instance, to trustees, who

(*a*) See *Paulet v. Doggett*, 2 Vern. 86.

(*b*) 1 Bro. C. C. 119.

(*c*) 4 Sim. 294.

(*d*) 2 Atk. 507.

must have the fee in order to do their duty as trustees, and provide for the children's maintenance. In a certain event the fee is given to the defendant, and then the testator's will and mind was, &c. The defendant takes the estate upon a certain condition. The estate is not charged with the legacies, as it was in *Poole v. Terry*, but a condition is imposed on the party taking it, and that condition is satisfied by the death of the legatee before the time of payment. In *Smell v. Dee (a)*, the legacies were given to certain persons at the end of ten years after the testator's death; and although it was contended that the bequest differed from a bequest to a person at twenty-one, inasmuch as it depended on a certainty, and not on a contingency, yet Lord Cowper held that the legacy lapsed. In *Watkins v. Cheek (b)*, where legacies charged on real estate were made payable at twenty-one, but the testator expressly declared that they should vest in the legatees at his death, Sir John Leach observed, that but for that direction they would certainly have sunk for the benefit of the devisee of the real estate. Where a legacy affects real estate, in order to prevent a lapse, the testator's intention in that respect must be clearly shewn. *Emes v. Hancock* illustrates that rule. The devisee of the real estate was not to have it till he attained twenty-three, and then he was to take it upon condition that he paid his sister a legacy out of the estate within two years after his so attaining twenty-three. The sister survived the period when the brother was to take the estate, but died within the two years, and it was held that her administrator was entitled to the legacy. But there the period of payment was only postponed to give the devisee an opportunity of raising the legacies. Here there is no intention to give the daughter any thing before the time of payment. The other childrens' legacies are not to be raised till that

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(a) 2 Salk. 415.

(b) 2 Sim. & S. 199.

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period, and it does not appear that the testator intended to make any provision for her by way of marriage portion. *Dawson v. Killet* is distinguishable from the present case, because there the legacy was expressly charged on the realty, and afterwards a direction given for payment. Here there is no such direction. *May v. Andrews (a)*, and *Harrison v. Naylor (b)*, are authorities for the defendant.

Mr. Bethell, in reply.—In *Watkins v. Cheek*, payment of the legacy was postponed, with reference to the circumstances of the legatee, and consequently Sir John Leach held that it would have lapsed but for the direction of the testator. In the case in Salkeld, the legacy was given at a particular time, which distinguished that case, and likewise that of *Harrison v. Naylor*, from the present. *May v. Andrews* was in effect overruled by *Dawson v. Killet*. Here the devise to Thomas Brooks was a present interest, subject to the contingency of maintenance. The 100*l.* which he had to pay was equally a present interest. He takes the estate *cum onere*.

May 24th. ALDERSON, B.—The principles which are to govern this decision are clear—the only difficulty is to make an application of them.

It has been established, that when a legacy is given absolutely, but the time of payment is only postponed, it does not lapse by the death of the legatee before the time of payment arrives. On the other hand, if the arrival of the time of payment be a condition annexed to the legacy, then it does lapse. The familiar instance of a legacy to A., on his attaining twenty-one, which lapses; and of a legacy to A., to be paid on his attaining twenty-one, which does not, shews the principle.

(a) 1 Bro. C. C. 122.

(b) 3 Bro. C. C. 108.

The will, therefore, must be carefully examined, to see whether the intention of the testator was to make the legacy conditional or not. Here, the testator leaves the land to trustees to pay the rents and profits to the wife for life, or during the widowhood; and after her death or marriage, to pay them for the maintenance of his children, until the youngest shall attain twenty-one. And he then adds:—"And my mind is, that at the death or marriage of my wife, I give and bequeath my estate to my son Thomas, yielding and paying to my daughters Martha and Ellen 100*l.* each." The whole difficulty seems to me to arise from the order in which the testator has expressed his intentions. If we invert the order of the two last dispositions, we shall make it clear enough. The testator seems to me to have left, on the death or marriage of his wife, the rents and profits of his estate to his son, charged with these legacies, with a provision that neither the son should enjoy the estate, nor the daughters receive their legacies, until the youngest child was twenty-one, the rents and profits being to be devoted in the meantime to their maintenance and education.

This brings the case within those authorities which have established that if the payment be postponed for the convenience of the estate, and not as a condition annexed to the person of the legatee, the legacy does not lapse.

I am, therefore, of opinion, that this legacy did not lapse.

Decree for the plaintiff, with costs.

CAPE v. CAPE.

27. 272.

JOHN CAPE, by his will, after giving pecuniary and specific legacies to his wife, and to his son George Augustus,

and maintenance of the wife of his son H., and for the support and education of his children born in wedlock. There were no children of H. at the testator's death:—*Held*, that the wife took the legacy absolutely to her separate use.

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Testator directed his trustees to apply a legacy to the support

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children coming *in esse* during her lifetime, namely, her own children, would have been entitled; but no children of the husband's coming *in esse* after that period would have been entitled. But here the will gives no interest to the children, either of the husband or the wife; it only points out the objects to which she was to apply the fund. All that the will directs her to do, she would naturally do without that direction.

ALDERSON, B.—My impression is, that the testator merely intended to give this legacy to the separate use of the wife; and if there had been children born at the time of the death of the testator, it would have been a question whether they did not take an interest under the will; but as there were no children at that time, I think the wife takes it absolutely to her separate use.



May 4th, 9th.

WHITING v. RUSH.—PEACOCK v. RUSH.

Upon a bill implicating a married woman in various frauds alleged to have been committed by her husband, in obtaining certain policies of insurance, and praying to have the policies delivered up to be cancelled:—*Held*, that her answer and disclaimer, denying that she had any interest in the policies, or any separate property, was insufficient.

THESE suits were instituted by the Pelican and other Insurance Companies, for the purpose of having certain policies of insurance, which had been effected on the life of Miss Helen Abercromby, set aside for fraud; and that the defendants Wheatly and wife, and Wainwright and wife, who were alleged to be implicated in the fraud, might be decreed to pay the costs of the suits; and that the defendant Rush, who had commenced actions on the policies, might be restrained by injunction, &c.

The object of the bills was to shew that Miss Helen Abercromby was in very poor circumstances, and had no interest in these insurances, but that they had been effected for the benefit of the defendant Wainwright, who had married a daughter of Mrs. Abercromby by a former husband. For this purpose, the bills stated that, in July,

1829, Mrs. Abercromby, and her two daughters, Helen and Madelina, (the latter of whom afterwards married the defendant Wheatly), came to live with Wainwright and his wife; that in August, in the same year, Mrs. Abercromby died; and that Wainwright, as her executor, had sworn that her effects were under the value of 100*l.*; that her daughters, Helen and Madelina, had applied for pensions as officers' daughters, and upon those occasions had made affidavits that they were not worth 10*l.* a year; that notwithstanding the poverty of these parties, applications had been made at various offices by the defendant Wainwright for policies on the life of Miss Helen Abercromby, for a limited period, to a very large amount; that in October, 1830, after two applications had been made for that purpose, and after Miss Abercromby had been strictly examined on the subject, the Pelican Office granted an insurance on her life for two years, to the amount of 5000*l.*; that about the same time an insurance upon her life was effected for 3000*l.* with the Imperial Insurance Office, and another insurance to a considerable amount with the Eagle Insurance Office; that in December, 1830, Miss Helen Abercromby, having been previously in good health, died suddenly; that shortly before her death she made two wills, which bore date the same day, by one of which she left all her property for the benefit of the defendant Wainwright and his wife, and appointed Wainwright her executor; and by the other she left all her property to her sister Madelina, and appointed one Warner her executor; that in consequence of the two wills, the parties interested came to an arrangement, under which Wainwright proved one of the wills, and undertook the execution of it; that Wainwright afterwards left this country, and that the defendant Rush was then appointed, by an order of the Ecclesiastical Court, administrator of Miss Helen Abercromby's effects, and in that character had brought the actions.

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In reference more particularly to the defendant Mrs. Wainwright, the bills charged generally that she was a participator in the fraud; and amongst other special circumstances, that she attended Miss Abercromby on all the occasions on which the latter had appeared before the directors of the respective companies. In particular the bill of the Pelican Insurance Company stated and charged, that upon effecting the policy for 5000*l.*, Miss Abercromby attended at the office with Mrs. Wainwright, and in her presence and hearing was questioned as to the reasons and inducements which led her to effect the insurance, and that her reply was, that it was done for her sole account, and her sole benefit, and that she had not effected, and had no intention of effecting, any other insurance upon her life. The bill then contained many strict inquiries, founded upon these charges, with a view of obtaining from Mrs. Wainwright an explicit answer upon these points.

The defendant, Mrs. Wainwright, her husband being still out of the jurisdiction, put in an answer and disclaimer to each of the bills, by which she denied that there was any scheme on her part to commit fraud, or that she ever had or claimed or pretended to have or claim any right or title to the policies in the bill mentioned, or in respect of any matter mentioned in the bill, and she disclaimed all right, title, and interest in and to the said policies, and in and to any other of the matters mentioned in the bill. She alleged that she had no property to her separate use which might be liable to the claims of the plaintiff; and she claimed the same benefit by her answer or disclaimer as if she had pleaded or demurred to the bill. To the inquiries made by the bill as to her being present at the office when Miss Abercromby applied for the insurance, she made no answer.

Exceptions having been taken to her answer for insufficiency,

Mr. *Simpkinson* and Mr. *G. Richards* appeared for the exceptions in the first suit.—It is clear that if this defendant were not married she would be bound to put in a full answer. Her being married can make no difference, because she is charged specifically with being a party to a fraud. The question is, whether a married woman, putting in an answer, is not bound to answer fully, although answering separately from her husband. In *Wrottesley v. Bendish* (a), Lord *Talbot* said, that as a general rule, the wife must answer fully, although in the case before him he thought, under the special circumstances, that she was not bound to do so. A party charged with a fraud cannot disclaim, and say he had no interest. In *Beauvoir v. Rhodes* (b), Tibbert was charged as an attorney and as a party to a fraud, and he put in a disclaimer; but it was overruled, and he was made to answer. A woman may be made liable for a fraud, even if married. [*Alderson*, B.—Can you make her pay the costs?] If she survived her husband she would have to pay, and the plaintiffs would have the benefit of her answer. She cannot take advantage of the accidental circumstance of his absence. If her husband were here she would be bound to answer.

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Mr. *G. Turner*, for the exceptions in the second suit.—A disclaimer put in by a married woman is inoperative against her husband. How can she disclaim away the right which he has in the property? She does not stand in any different situation from any other married woman. It may be said that her answer could not be read against her husband, and therefore is unnecessary. But suppose she has documents implicating herself and her husband,—is it to be said that she is not to produce them? Letters between herself and her husband may be produced. Again, the plaintiff may prove that she has separate pro-

(a) 3 P. W. 235.

(b) Not reported.

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party. At all events, if she becomes discovert before the hearing, she will be amenable to the costs of the suit. She has undertaken to answer in part, and therefore should be made to answer fully.

Mr. *Stuart*, for the defendant, Mrs. Wainwright.—If the defendant can shew that she has no interest, and is under no liability, there is an end of the case against her. She has answered every charge that goes to shew that she has any liability, and she disclaims any interest. The argument for the plaintiffs would go to the extent of putting an end altogether to disclaimers. The discovery asked of this defendant is only incidental to the relief sought for; and if the relief fails, the discovery fails also. Now, there can be no relief as against her. No personal decree can be had against a married woman, except there be separate estate, or except, perhaps, there be gross charges of fraud against her personally. It is enough, therefore, for her to shew, in such a case as this, that she is under no liability. In *Glassington v. Thwaites* (a), it was held, that a simple disclaimer by one of the defendants was an insufficient defence, because he did not go on to shew that he was under no liability in respect of the matters contained in the bill. Here, the bill charges that she has an interest in the policies, and ought to deliver them up; but she denies that she has any interest in them. In *Greatley v. Noble* (b), a demurrer was put in by Lady Pomfret, and the question was, whether the suit could be extended to a married woman on the ground of fraud. The demurrer was overruled on special grounds, but the doctrine of the Court clearly goes to this,—that a fraud creates only a general demand against the estate, and that a married woman cannot be made personally liable in a court of equity. If there be separate property, that property, as it must be

(a) 2 Russ. 458.

(b) 3 Madd. 79.

vested in trustees, may be made liable to demands affecting it; but unless that be so, a court of equity has no means of reaching the wife's property, so as to make it liable at all: *Murray v. Barlee* (a). *Francis v. Wiggzell* (b) is a strong authority in favour of the defendant. There is no pretence for keeping her before the Court, for the purpose of discovery; for, against whom can her answer be used? Not against herself, for she has no interest; nor against her husband, because a court of equity cannot compel a wife to answer, in order to ground any proceedings against her husband: *Le Texier v. Margravine of Anspach* (c). That case went beyond any thing alleged here. Wainwright and his wife are not plaintiffs at law; they may be examined as witnesses at law, and, on that ground alone, there is no necessity to put this defendant to make discovery here.

Mr. *Simpkinson*, in reply.—Suppose this defendant were a widow, could she, charged as she is with being a party to these frauds and arrangements, and the bill praying that these policies may be delivered up as against her, be permitted to protect herself by such an answer as this? Unquestionably she could not. *Glassington v. Thwaites* was not a case of mere disclaimer, for it is very seldom that a mere disclaimer can be put in. It is generally an answer and disclaimer. It was so in that case. It began, not by disclaiming, but by stating, that the defendant had been an owner in the newspaper, but had parted with his interest. Is the case of this defendant altered by the circumstance of her being a married woman? She says she has no separate property. But the bill goes farther than merely to seek to affect her separate property. It prays the delivery up of an instrument in the fraud connected with which she is charged as a party. Can she say that the plaintiff is entitled to have that instrument delivered

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(a) 4 Sim. 82; 3 M. & K. 209.

(b) 1 Madd. 258.

(c) 5 Ves. 322.

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up as against her, and yet that she is not bound to answer fully upon that subject? It may be admitted that her discovery cannot be used against her husband, and perhaps not against herself, but on the ground that it may be used to some purposes, she is bound to give discovery. What use the discovery may be put to is another question. The case in *Peere Williams* is express on that subject. The point was raised that the answer could be of no avail, but Lord *Talbot* said, that he would not take upon himself to overthrow what had been the constant practice in these cases, namely, that the wife as well as the husband should answer fully.

May 9th.

ALDERSON, B.—I have looked into the authorities, and I think the plaintiff is entitled to my judgment. It is admitted, that if the wife is bound to answer fully, she has not done so. But it is contended, that as her answer denies that she has any separate property, and contains a disclaimer of any interest in the suit, it is sufficient. In *Glassington v. Thwaites*, the Court held, that a party by a disclaimer cannot get rid of his liability to answer. Now here, the relief prayed is, that, notwithstanding the interest of this married woman and her husband, a certain deed in the hands of a third person may be delivered up to be cancelled, having been obtained by means of a fraud, to which she and her husband were both parties. Now, according to the case cited from *Peere Williams*, the course of the Court, in such cases, is to compel both husband and wife to answer fully. Whether or not her answer may ultimately be made evidence in the cause, is another question. The cases cited as having been determined by Sir *Thomas Plumer* are quite distinguishable from the present. There, general relief against the married woman was prayed, and a personal decree sought for. I entertain great doubts whether this disclaimer is valid; but even if it were, it would make no difference. The exceptions must be allowed.

*Bankers & Buttricks. 7 News. 134**But see Jones & Beach. 2 D.C. & C. 286.*

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THORPE v. JACKSON.

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THE bill stated that Edmund Hamer, since deceased, and the defendants James Lomax, Patrick Magee, and William Dakin, having, in or about the month of May, 1834, opened a joint banking account with the Northern and Central Bank, that bank made various advances to those parties jointly and on their joint account, and also made divers payments to the joint order and on the joint account of those parties; and that by reason of such advances and payments, the said Edmund Hamer, James Lomax, Patrick Magee, and William Dakin, became and were on the 13th day of July, 1836, jointly indebted to the said Northern and Central Bank in the sum of 3808*l.* 11*s.* 1*d.* That Edmund Hamer being, at the date of his will, and at the time of his death, seised or otherwise well entitled in fee simple of or to divers real estates, and being also possessed of personal estate, consisting &c., duly made and published his last will and testament in writing, bearing date the 8th of July, 1836, which was executed and attested so as to pass real estates, whereby he directed that all his just debts, funeral and testamentary charges and expenses, should be paid and discharged out of his estate and effects, and appointed the defendants Thomas Jackson and Luke Trotter his executors. That Edmund Hamer died on the 13th day of July, 1836, without having revoked or altered his will; and that the same was, on or about the 19th day of July, 1836, duly proved by the defendants Thomas Jackson and Luke Trotter, who thereupon possessed themselves of the testator's personal estate and effects, and thereout paid all his separate debts, funeral and testamentary expenses; and that after such payments there remained a considerable surplus in their hands. That the whole of the said

Every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint and several; therefore, where four persons had opened a joint account with certain bankers, who had advanced to them money on such joint account:—*Held*, that upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or shewing that the latter were unable to pay by reason of their insolvency.

But to a bill filed by joint creditors for the purpose of obtaining relief against the assets of a deceased partner or joint contractor, the surviving partners or joint contractors must be made parties, though no decree is sought against them; such persons

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joint debt which was so due to the said banking company, at the time of the death of the said Edmund Hamer, still remains due and owing, and that since his death, the said William Dakin hath become and now is wholly insolvent. That the said banking company, being entitled to have the said debt of 3808*l.* 11*s.* 1*d.*, and interest, paid and made good to them out of the estate of the said Edmund Hamer, have requested the said Thomas Jackson and Luke Trotter, as executors of the said Edmund Hamer, to pay and satisfy the said debt out of the estate of the said Edmund Hamer, so received by them, after payment of the separate debts of the said Edmund Hamer; but that those defendants refuse to comply with such requests, pretending, amongst other things, that the estate of Edmund Hamer is not liable to make good or satisfy the same; whereas the plaintiff charges the contrary to be the truth, and that after the payment of the separate debts, and of the funeral and testamentary expenses of the said Edmund Hamer, the residue and surplus of such estate is liable to pay and make good the full amount in which the said Edmund Hamer was at the time of his death indebted to the said banking company, jointly with the said defendants, James Lomax, Patrick Magee, and the said William Dakin.

The bill prayed an account of what, at the time of the death of Edmund Hamer, was due to the Northern and Central Bank of England, on the joint account; and that the defendants, the executors, might be decreed to pay the balance out of the estate and effects of the said Edmund Hamer, after payment of his separate debts, and funeral and testamentary expenses; and that if the said defendants Jackson and Trotter should not admit assets, then that the usual accounts might be taken of the personal estate and effects of the said Edward Hamer received by the defendants, and that the same might be applied in a due course of administration.

To this bill the defendants Jackson and Trotter demurred; first, for want of equity; and secondly, because William Dakin was not made a party to the suit.

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Mr. *Temple*, and Mr. *Pigott*, for the demurrer.—The prayer of the bill claims no payment against either Lomax or Magee, but solely against the executors of Hamer. The bill proceeds upon a mistaken notion of the extent to which a court of equity has made the assets of a deceased partner liable. It must be admitted that the assets of a deceased partner are liable for a joint debt where it is a trading demand, and where it is shewn that the joint creditor cannot recover against the other parties. Now, first, there is no allegation that this was a trading transaction. These parties may have been joint trustees under a deed, or joint executors, but it does not appear that they were jointly engaged in trade. Again, there is nothing in this bill to shew that the plaintiff cannot recover against the other parties. It is alleged, indeed, that Dakin is insolvent, but it is not stated that he has taken the benefit of the Insolvent Act, and that nothing is recoverable from his estate. If that had been alleged, there might have been some grounds for dispensing with the necessity of his being made a party; but all that is stated is, that since the death of Hamer, Dakin “hath become, and now is, wholly insolvent.” There is not even a bare statement of insolvency in regard to the defendants Lomax and Magee, and yet no relief is prayed against them. Admitting that they were partners in trade with the deceased, they are the parties primarily liable, and the plaintiff ought to shew a legal incapacity to recover from them, before he attempts to charge the assets of their deceased copartner. But suppose they were mere trustees,—and for any thing that appears on the bill they were nothing more,—it is clear that none of them could have intended to make himself liable beyond the term of his

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trust, which ceased with his death. A court of equity has not decided that all debts which are joint at law are joint and several in equity; not even where all the joint debtors have had the benefit of the money. The only cases in which that doctrine holds are those of trade, or where the security has been made joint by mistake; and even then the security appears to have been given in mercantile transactions alone. That a court of equity, in construing joint debts to be in joint and several, proceeds entirely on the *lex mercatoria*, is evident from the judgment of Sir William Grant in *Sleech's case* (a): "I apprehend," he says, "that by the general mercantile law, a partnership contract is several as well as joint. That may probably be the reason why courts of equity have considered joint contracts of this sort (that is, joint in form), as standing on a different footing from others." Upon the principles here laid down, the cases of *Lane v. Williams* (b), *Daniel v. Cross* (c), *Hoare v. Contencin* (d), and *Gray v. Chiswell* (e), were decided. In the cases of joint bonds, although the Court, in construing them several, has ostensibly proceeded on the ground of mistake, yet it appears that the bonds were uniformly given for monies borrowed in the course of mercantile transactions: *Primrose v. Bromley* (f), *Simpson v. Vaughan* (g), *Bishop v. Church* (h), *Thomas v. Frazer* (i), *Burn v. Burn* (k). The case of *Cowell v. Sykes* (l) is not at variance with this view of the subject, because there the joint creditor had become a separate creditor of the deceased partner before he made his application to come in and prove his debt.

But supposing the Court should be of opinion that this contract is in equity several as well as joint, it is sub-

(a) 1 Mer. 564.

(b) 2 Vern. 292.

(c) 3 Ves. 277.

(d) 1 Bro. C. C. 27.

(e) 9 Ves. 118.

(f) 1 Atk. 90.

(g) 2 Atk. 31.

(h) 2 Ves. sen. 100.

(i) 3 Ves. 399.

(k) 3 Ves. 573.

(l) 1 Russ. 191.

mitted that the plaintiff, before he can be entitled to the relief here prayed for, should shew that the other parties are insolvent. It must be admitted, that the case of *Wilkinson v. Henderson* (a) is at variance with this position, but that case is in direct opposition to every authority on the subject. Lord *Eldon* has distinctly laid it down, that the insolvency of the other partners is a necessary preliminary to obtaining any relief against the assets of the deceased partner. The case of *Wilkinson v. Henderson*, however, is at variance with this opinion of Lord *Eldon*, and inconsistent with all the principles on which these cases have hitherto proceeded. The consequence of that decision is to throw on the representatives of the deceased partner the necessity of filing a bill against the continuing partners for contribution.

Supposing that the demurrer for want of equity should be overruled, the demurrer for want of parties is good: *Harrison v. Hole* (b), *Cockburn v. Thompson* (c), *Haywood v. Ovey* (d), *Bland v. Winter* (e). If the account is taken merely between the creditor and some of the joint contractors, and they have to file a bill for contribution, the defendant in that suit would not be bound by a decree in this suit, to which he is not a party. Besides, although he may be insolvent, it does not follow that he has no available estate.

Mr. *Simpkinson*, and Mr. *Bacon*, for the bill. Four persons opened an account with the Northern and Central Bank of England. Credit was given and money advanced to the four by the bank, and the money was received and appropriated by the four. One of the four afterwards died, having made his will, by which he charged his real estate with the payment of his debts. He appointed the defendants his executors. They have possessed his assets,

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(a) 1 M. & K. 582.

(b) Rep. Temp. Finch, 15.

(c) 16 Ves. 326.

(d) 6 Madd. 113.

(e) 1 Sim. & Stu. 246.

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have paid all his separate debts, and have a large fund in their hands applicable to the payment of the plaintiff's demand. The plaintiff says that his demand ought to be made good out of the assets in the defendants' possession, but the defendants resist this claim, on two grounds: first, that the assets of their testator are not liable in equity to the satisfaction of this demand; and secondly, that all the parties who ought to be present at the taking these accounts are not before the Court.

Upon the first point, it is admitted, that if this had been a partnership dealing, the bill would have been right, and plaintiff entitled to enforce his demand against the estate of the deceased partner. It is contended, however, that as it does not appear that this was a partnership dealing, the usual rule of equity will not apply. But there is no authority for that proposition. If four persons have the benefit of a sum of money, it is immaterial in what character they receive it. If they receive it jointly and severally, they are bound jointly and severally to repay it. If they all have the advantage of the money, they, in equity at least, receive it jointly and severally, and the creditor is not bound to proceed against them all. In *Simpson v. Vaughan* (a), where the bill was filed against the executor of a deceased partner, to have a joint bond which had been given by the partners declared several, and made payable out of the deceased's partner's assets, Lord *Hardwicke* said: "The principal ingredient for the plaintiff is, that it is not a debt in the way of trade, but an actual loan of a sum of money; and the debt consequently arises from the contract itself; and if there is any defect in the contract, the Court will resort to what was the principal intention of the parties,—that they should be severally and jointly bound." So that his Lordship here inferred, from the nature of the contract, that the debtors should be jointly and severally bound. The cases of

Bishop v. Church (a), *Primrose v. Bromley* (b), and *Orr v. Chase* (c), proceeded on the same principles. But then it is said, that, admitting relief is obtainable in equity against the assets of the deceased partner, the surviving partners must first be shewn to be insolvent. *Sleech's case*, however, is a direct authority against that proposition, and Sir *William Grant's* decision in that case was subsequently affirmed by Lord *Brougham*, in his rehearing of *Devaynes v. Noble* (d). The subsequent case of *Wilkinson v. Henderson* is fully in accordance with the opinions of Sir *William Grant* and Lord *Brougham*. It was decided by Sir *John Leach*, on the same principle, that as a joint creditor cannot have any relief in equity against the surviving partners, he must file his bill against the representatives of the deceased partner, and leave them to proceed against the surviving partners. It is clear that Lord *Eldon* must have adopted that principle in *Cowell v. Sykes*, and at all events the authority of Sir *John Leach's* decision is admitted in *Braithwaite v. Britain* (e). In *Hoare v. Contencin* the bill brought by the joint creditors was bad in its inception, and therefore could not be rendered good by the death of one of the partners defendants after the filing of the bill. In *Gray v. Chiswell*, the only question was, whether the joint creditors should be relieved out of the deceased partner's estate, *pari passu* with the separate creditors, and it was held that they should not. In the present case that is not attempted.

Then, as to the demurrer for want of parties. The omission of Dakin as a party is not objectionable. It is true that the plaintiff has made the other surviving debtors parties, but he was not bound to do so. It may be convenient, but it is not necessary to do so. [*Alderson*, B.—It is convenient for the sake of ascertaining the

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(a) 2 Ves. sen. 100.

(b) 1 Atk. 89.

(c) 1 Mer. 729.

(d) 2 Russ. & M. 495.

(e) 1 Keen, 206.

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amount of the debt.] In *Wilkinson v. Henderson*, Sir *John Leach* said that he could make no decree against *Hartley*, the surviving partner, the remedy against him being altogether at law, though he might be properly joined for the purpose of contesting the demand. Besides, *Dakin* being insolvent, no relief could be had against him. The only use he could be put to would be to resist the demand; and he could do that as well in the character of a witness. He is utterly insolvent. [*Alderson*, B.—I do not know that a person who is utterly insolvent has no interest in the suit. He may be unable to pay, but only temporarily so.]

Mr. Temple, in reply.—The judgments of Sir *William Grant* in *Sleech's case*, and Lord *Brougham* in *Devaynes v. Noble*, proceeded on the distinction, before adverted to, between mercantile and other contracts in regard to the species of relief sought by this bill. In *Ex parte Kendall* (a), such relief was put by Lord *Eldon* entirely on the ground of the equities between the partners, the joint creditor proceeding in the first instance against that fund upon the faith of which he allowed the debt to be incurred, and then, upon the failure of that, resorting to the deceased partner's estate as a secondary fund.

ALDERSON, B.—The point which I shall reserve for my consideration is, whether the principle on which *Sleech's case* was decided is confined to mercantile transactions. If it be so, the defendants will be entitled to the judgment of the Court on the first ground of demurrer. But if the principle contended for on the other side is right—namely, that every joint loan is in equity to be considered joint and several, the defendants will be primarily liable, though the plaintiff does not proceed against the parties who are solvent. In that case all the debtors being principals, the

right of the plaintiff to proceed immediately against the assets of one of them who is deceased, in preference to proceeding against the survivors, will be established, and the demurrer upon that point must be overruled.

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ALDERSON, B.—This was a demurrer to the plaintiff's bill on two grounds—first, for want of equity; secondly, for want of parties.

June 21st.

The first is the only material question. The bill is filed by the public officer of the Northern and Central Bank of England against four defendants, viz. Thomas Jackson and Luke Trotter, the executors of Edmund Hamer, deceased, and James Lomax and Patrick Magee, two of the surviving partners of the said Edmund Hamer. The facts stated in the bill are, that Hamer, Lomax, and Magee, together with one William Dakin, who is stated since to have become wholly insolvent, opened a banking account jointly with the bank, paid in monies from time to time, and received advances; and that at the time of Hamer's death they were indebted to the Northern and Central Bank in a considerable sum on their joint banking account. That Hamer died, leaving Jackson and Trotter his executors, who were possessed of assets sufficient for the payment of this debt after discharging all their testator's separate debts. The bill prays an account against the defendants, and that the executors of Hamer may pay the same, when ascertained, out of the assets in their hands. To this bill there is a demurrer for want of equity, on the ground that this debt survived at law, and that there is no claim in equity against the representatives of the deceased party.

After looking through all the cases referred to in the argument, I have come to a different conclusion, and think that, as to this point, the demurrer must be overruled. I take the rule to be as laid down by Lord *Eldon* in *Ex parte Kendall* (a), namely, "That where a man

(a) 17 Ves. 525.

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has chosen to take the joint contract of several, though at law his security is wearing out as each of his debtors dies, yet it is fit that the creditor whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a court of equity will, under certain modifications, constitute that demand." Now, in this proposition, I find no trace of the distinction set up in the course of the argument, that such debt must be a mercantile debt incurred by joint traders. Nor can I perceive why that should be so. It is true that the question has most frequently arisen in such cases. But this would naturally occur; for courts of equity, as stated in *Gray v. Chiswell*, by Lord *Eldon*, have, in establishing the rule, acted upon the intention of the parties, and in all mercantile transactions such intention is more obvious, for such contracts by the mercantile law are joint and several. But in *Cowell v. Sikes*, the two joint debtors were not partners in any trade, and yet the decision there was, that the creditor might recover against the deceased partner's effects. It is said that in *Sleach's case*, Sir *W. Grant* has decided upon the distinction now contended for. I do not apprehend this to have been the case. He says, indeed, that by the mercantile law a partnership contract was several as well as joint; and then he adds, that this may probably be the reason why courts of equity have considered joint contracts of this sort (that is, contracts joint in form) as standing on a different footing from others. I conceive, therefore, that partnership trading debts are only one, and that the most frequent, case of the general rule; which is, that wherever a court of equity sees that in a contract joint in form, the real intention of the parties is, that it shall be joint and several, it will give effect to such intention. Now, I think that a contract for a loan of money, giving to the creditor the benefit of the security of several persons, is of that description. Here it is a loan of money by bankers to certain persons, their joint customers. Is it not obviously the intention of both

parties, that the property of all shall be responsible for the money thus obtained? In the case of *Simpson v. Vaughan* (a), Lord Hardwicke, upon this obvious intention, corrected the mistake in the joint bond. Then the question arises, whether this equity exists until after all the surviving contractors have been found incapable of paying the amount. I think that question concluded by the case of *Wilkinson v. Henderson* (b), to the reasons of which I fully accede.

The other question raised upon the present demurrer is, whether Dakin ought not to have been joined as a party to this suit. I think he ought. In the first place it is not sufficiently stated whether his insolvency is of a permanent description; and secondly, he is at all events interested in taking the account as to the amount of the joint debt, although it is true no decree can be made against him, nor against the two solvent partners.

Demurrer for want of equity, overruled;
demurrer for want of parties, allowed.

(a) 2 Atk. 31.

(b) 1 M. & K. 583.

MILLER v. ARROWSMITH.

MR. FABER, for the defendant, moved that the bill might be dismissed with costs for want of prosecution, the plaintiff not having proceeded in the cause, pursuant to his undertaking to speed. The plaintiff's clerk in court being dead, an affidavit was produced of service of notice of this motion on the plaintiff's solicitor, and of the solicitor's having accepted such service.

PER CURIAM.—The Court cannot recognise such service. The proper mode of proceeding is to serve a *sub-pœna* on the plaintiff to nominate a new clerk in court,

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May 31st.

Notice of a motion to dismiss the bill for want of prosecution must be served on the party's clerk in court, and not on his solicitor; and if the clerk in court be dead, a new clerk in court must be nominated for the purpose of accepting such service.

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and upon such clerk being nominated, to serve him with the notice of this motion.

On a subsequent day, the motion was renewed, on affidavit of service on the plaintiff personally of notice of the motion, and also of the *subpœna* to name a new clerk in court. Whereupon, and it appearing that the plaintiff had not appointed a new clerk in court,

THE COURT made the order as prayed.

C. XIX.

BERRY, v. JOHNSON.

June 22nd.

Where a sale had been directed under a decree, but there was no reference to the Master as to the title, and no available fund in Court:—

Held, that the purchaser was entitled to be reimbursed by the plaintiff the costs of investigating the title and confirming the purchase.

THE bill was filed in this case by a legatee, for the payment of his legacy, which was charged upon the real estate of the testator. There being an insufficiency of personal assets, the Court ordered the real estate to be sold. The property was accordingly put up to auction, and one William Scott became the purchaser of part. The remaining part was purchased by a party who paid his purchase-money into Court, but had received no conveyance, and this purchase-money was the only fund in Court. It being afterwards ascertained by the legal advisers of Scott that a good title could not be made to the premises purchased by him,

Mr. *Koe* now moved that all costs, charges, and expenses incurred by the purchaser in the investigation of the title, together with the costs of this application, might be reimbursed him by the plaintiff. He cited *Reynolds v. Blake* (a) and *Smith v. Nelson* (b).

Mr. *Simpkinson*, *contra*.—It would be a strong thing for the Court to say, that when a legatee comes here to

(a) 2 S. & S. 117.

(b) 2 S. & S. 567.

obtain payment of his legacy, and the Court directs a sale, which is its own act, the plaintiff is to be compelled to pay the costs of the purchaser. Here, there is a fund in Court applicable to the general purposes of the suit; and if the purchaser is entitled to have his costs at all, he ought to have them out of that fund. These costs were incurred out of Court, and are not legitimate costs in the cause. The greatest part of them were entirely voluntary, and as to those, at least, the Court can have no jurisdiction. In *Reynolds v. Blake*, there was a reference in the cause, and the order was for payment of the costs of the reference and of the application, but not for payment of all the costs in investigating the title. On a bill filed for the delivering up of the conveyance to be cancelled, there being no good title, the Court will not give the party aggrieved all the previous costs of investigating the title. The only case in which the Court will give costs in those large terms is, where one party having purchased, another party applies to have the biddings opened; in which case the Court will not grant the application except upon the terms of doing full and complete justice to the purchaser.

Mr. *Koe*, in reply.—The estate was put up for sale by order; the plaintiff has the conduct of the sale, and the purchaser is compelled to confirm the purchase. The only fund in Court consists of the purchase-money paid in by another party, who has not had a conveyance. If that fund is not available for the purposes of the suit, the plaintiff is personally liable. In *Smith v. Nelson* there was no fund in Court.

ALDERSON, B.—I think the purchaser is entitled to the costs properly incurred in investigating the title and in confirming the purchase. Those costs, and the costs of this application, must be paid by the plaintiff, and he may recover them in the suit.

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1898.

Jan. 30th.

Purchaser, under circumstances, allowed to pay his purchase money into Court, and to be let into the possession and receipt of the rents and profits without prejudice to any subsequent objection which he might be advised to make to the title.

MR. DALZELL moved for liberty to the purchaser to pay his purchase-money into Court, and to be let into the possession and receipt of the rents and profits, without prejudice to any objection which he might be advised to make to the title upon subsequent investigation.

THE COURT observed, that this sort of motion was becoming very frequent, and inquired whether it was consented to.

The reply was that notice of this motion had been served on the other parties, and that they had not appeared. Whereupon,

The order was made as prayed.

1837.

July 4th.

Testatrix bequeathed a legacy to A., which she declared should be taken in satisfaction of all claims which A. then had or might have upon the estate after her decease. At the time of making the will, A. had a claim upon the testatrix for a legacy under the will of I. S.:—*Held*, that parol evidence was not admissible to shew that this was the not compellable

DIXON v. SAMSON.

JOSEPH SNOWBALL, by his will dated the 26th February, 1821, gave and bequeathed to the defendant the sum of 100*l.*; and, subject to the payment of his debts, funeral and testamentary expenses and legacies, the testator gave and bequeathed all and singular his estate and effects to his wife Mary Snowball, whom he appointed his executrix.

Upon the death of the testator, Mary Snowball proved the will, and paid to the defendant 53*l.* on account of his legacy. Afterwards, in September 1828, she placed in the hands of the defendant, who then lived in London, the sum of 200*l.* for the purpose of being invested in the funds for her use; the defendant, however, retained that

that this was the only claim which A. ever had upon the testatrix, and consequently that A. was not compellable to elect between the benefit of the will of the testatrix and that of J. S.

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money in his own hands. On the 10th January, 1832, which was very shortly before her death, Mary Snowball made her will, whereby, after reciting that the defendant then stood indebted to her in the sum of 200*l.* received by him of her for the purpose of being invested in her name in government securities, and which had not been by him so applied, gave and bequeathed the said sum of 200*l.* to the defendant and his brother, Thomas Burn Samson, in equal shares, and declared that such bequest should be, and should be taken and accepted as and in full satisfaction and discharge of all and every claim and demand of what nature or kind soever, which the defendant and the said Thomas Burn Samson or either of them then had upon her, or which they or either of them might have upon her estate and effects after her decease. And the testatrix appointed the plaintiffs executrix and executor of her will.

In August, 1835, the defendant filed his bill in this Court against the plaintiff, praying for an account and payment of his legacy out of the assets of Joseph Snowball possessed by the plaintiffs. To this bill the plaintiffs pleaded, that at the time of the death of Mary Snowball, the defendant was indebted to her in the sum of 200*l.* for monies lent and advanced, and that the same was greatly more than the amount of what was due from Mary Snowball, as the representative of her husband, in respect of the legacy of 100*l.*: and that the defendant being so indebted as aforesaid, the said Mary Snowball duly made and published her last will, &c. The plea then set forth *verbatim* so much of the will of Mary Snowball as is above stated.

The plea came on for hearing before the *Lord Chief Baron*, at the sittings after Trinity Term, 1836, when his Lordship overruled it, upon the ground that it did not necessarily appear that the claim and demand which the defendant was, in the will of Mary Snowball, stated then to

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have upon her, or which he might have upon her estate and effects after her decease, was the claim or demand which he had or might have in respect of the legacy bequeathed to him by Joseph Snowball. The consequence of this decision was, that the plaintiffs put in their answer, and no evidence being entered into by them relative to their claim for the 200*l*., the defendant obtained a decree.

The plaintiffs now brought their bill against the defendant, calling upon him to elect between the benefits intended for him by the will of Mary Snowball, and those intended for him by the will of Joseph Snowball; and in case of his electing to take under the will of Joseph Snowball, that he might be decreed to replace the 200*l*.. The bill contained an allegation that the defendant had not any claim or demand of any nature or kind soever upon the said Mary Snowball, at the date of her said will, other than and except the claim or demand which he had against the said Mary Snowball, as the executrix of the said testator, Joseph Snowball, in respect of the said legacy of 100*l*.. bequeathed to him by the said testator; and that he hath not now any claim or demand upon her estate, save and except in respect of the said legacy.

To this bill the defendant demurred, first, for want of equity, and secondly, because Thomas Burn Samson was not made a defendant in the suit. The latter ground of demurrer was not discussed.

Mr. O. Anderdon for the demurrer.—The defendant being a legatee under the will of Joseph Snowball, has, in a suit instituted by himself, obtained a decree for payment of that legacy out of Joseph Snowball's assets. The decree was had against the plaintiffs, not as the representatives of Mary Snowball, but as those of Joseph. Yet, the equity which the plaintiffs rest upon is, that Mary Snowball, in her lifetime, delivered 200*l*.. to the defendant to be invested in stock in her name, and that the defendant,

having failed to perform that duty, ought now to be compelled to do so. At all events, that is one of the alternatives in the bill. But the cases have distinctly settled that no bill will lie for the specific performance of an agreement relative to stock, the remedy being entirely at law.

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The point as to the construction of the will has been disposed of by the plea. The defendant ought not to be put to his election except in a very clear case. A construction has already been put upon the will by the judgment of the Lord Chief Baron, and no parol evidence can be admitted to contravene the conclusion flowing from the construction of the will itself: *Collins v. Doyle (a)*, *Dummer v. Pitcher (b)*. [Alderson, B.—There the question was, whether there was any election at all. In this case the doubt is to what the election is to be applied.] The question is, whether the averment in this bill can be admitted to overrule the plain words of the will, and by that means to raise a case of election. We must take the will as we find it. There might have been a notion in the mind of the testatrix that the defendant had a claim against her estate for the portion of the legacy remaining unpaid, but the Court cannot indulge in conjectures on that head. In terms the testatrix bequeaths this legacy only in satisfaction of claims upon her estate, but it is clear that the defendant's claim was against the estate of the original testator.

Mr. Elderton, for the bill.—This is, in fact, a cross bill, and, generally speaking, a demurrer to a cross bill will not lie: *Mitf. Pl.* 203. The gift by Mary Snowball to the defendant is in satisfaction of all demands on her or her estate, which is a sufficient ambiguity to let in parol evidence. In *Dummer v. Pitcher*, it was attempted to make

(a) 1 Russ. 135.

(b) 2 M. & K. 262.

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the will speak before the death of the testator; no such question arises in this case. [*Alderson, B.*—The real reason of that and other decisions is, that a will of personalty, in reference to the legatees, speaks when it is made, but points to property which is to exist *in futuro*. Here the testatrix is speaking of debts and claims which are or may be due at the time of her decease. You confine that to this one claim; but how do you know that she had not other claims in her mind? Is parol evidence admissible to explain a bequest of personalty, or a bequest which is not limited to the time when the testator speaks, but extends from that time to the time of his death?] The will can only apply to one state of circumstances, where one state only exists. The bill avers that there was no other demand upon her than this. [*Alderson, B.*—The question is, whether that averment is material. If the will includes the present demand, you do not want it. If you are obliged to resort to it in explanation of the will, the question is, whether parol evidence is receivable to prove it.]

Mr. *Anderdon* in reply.

ALDERSON, B.—When the plea in the cause of "*Sampson v. Dixon*" was heard before the Lord Chief Baron, his Lordship was of opinion, independently of any thing arising out of extrinsic evidence, that this will did not extend to the claim which the present defendant then made upon the assets of Joseph Snowball. Then the question is, whether I can take notice of any evidence shewing that this was the only claim which the present defendant had upon Mary Snowball, the representative of Joseph Snowball, at the time of her decease. I think I ought not so to do. Where a testator speaks of a state of facts which may exist at any time between the making his will and of his death, evidence is not admissible to shew that there

was any particular time to which his will was intended to be applicable. The case of *Dummer v. Pitcher*, and the authorities on which that case rests, and which were decided long before, are sufficient to establish that position.

In the case of real estate, the intention of the party is referable to a state of facts existing when the will is made. In a will of personal estate, the same observation applies to the person of the legatee. But when the testator speaks to facts which may exist any time between the time when he speaks and his death, how is the Court to judge of the particular time to which he refers? I cannot therefore think that, in this case, the party ought to be put to his election. If the plaintiffs are disposed to try the question at law, they have at law a full remedy for all they can claim against the defendant.

Demurrer allowed.

HARBETT v. BUCKINGHAM.

IN this cause the plaintiff had filed no replication, and the defendant obtained an order *nisi* for dismissing the bill for want of prosecution.

Mr. *G. Richards*, for the plaintiff, on shewing cause against the order for dismissal, contended, that as no replication had been filed, a mere undertaking by the plaintiff to amend was sufficient cause against dismissing the bill.

Mr. *Blenman*, *contrà*, said, that after notice to dismiss for want of prosecution, it was not a matter of course for the plaintiff to amend his bill, but that he must give notice of his intention to amend, and state by affidavit the materiality of his proposed amendments.

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Jan. 30th.

After motion by the defendant to dismiss the bill for want of prosecution, the plaintiff wishing to amend his bill must shew special cause of amendment against the order for dismissal, and give two days' notice of the cause which he intends to shew.

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PER CURIAM.—After notice given by the defendant of a motion to dismiss the bill for want of prosecution, the plaintiff must shew some special cause against the order to dismiss: and if he intend to amend his bill, he ought to shew by affidavit the materiality of his amendments; and the practice seems to be that he should give two days' notice of the cause which he intends to show.

The motion then stood over by consent.

April 20th.

DICKEN v. CLARKE.

Testator devised one moiety of the proceeds of his real estate to his son for his life, and the other moiety to his, the testator's, wife, during her widowhood; and directed that in case of the wife's death or marriage in the lifetime of the son, her moiety should go to the son in the same manner as the first mentioned moiety. The testator then directed, that in case his son should die in the widowhood of his mother, and leave lawful issue, the son's

moiety (and, after the widow's death or marriage, her moiety) should become the property of such issue. The testator then devised as follows:—"But in case of such, my son's, demise in the widowhood of his said mother, without leaving lawful issue, then I wish and direct the whole of the proceeds of my property to be paid to her during her widowhood, subject to an annuity of 40*l.* per annum to be paid to Mr. T. B.; and in case of the marriage or death of my present wife, my said son being dead, and leaving no lawful issue, then I give the whole of the proceeds of my estate to J. B." The testator's son survived the widow, and died without issue:—*Held*, that the contingency on which J. B. was to take the estate was destroyed, and that the heir-at-law of the testator was entitled.

JOSEPH MOTERSHEAD DICKYN by his will, after making certain specific bequests to his wife, gave and devised all his real and personal estate to his executors and trustees therein named, upon certain trusts, which were declared in the following terms:—"First, I will that my trustees shall pay, or caused to be paid annually, in two half-yearly payments, one moiety or equal half-part of the proceeds of all my property, whether personal or real, to my son Halliday Dickyn, after he shall attain the age of twenty-one years, for and during the term of his natural life; and previously to his attaining twenty-one years, so much of the said moiety as shall be deemed proper to maintain and educate him. The other moiety of the proceeds of my said estate, together with my plate, (which I wish in no case to be sold), linen and household furniture, I direct my said trustees to pay, or

cause to be paid, and allow the use of my said plate, furniture, &c., to my dear wife, so long as she shall continue unmarried, and my widow. And in case of her death or marriage in the lifetime of my said son, I direct her moiety or equal half-part of the proceeds of my estate, whether personal or real, or both together, to be paid, with my plate, furniture, &c., to my said son Halliday Dickyn, in the manner and for the purposes as I have before directed respecting his moiety; but that the principal now placed in trust shall not be absolutely subject to his control, or become his sole property, until his eldest lawfully-begotten child shall attain the age of twenty-one years, but it shall remain in the hands of my said trustees and their representatives in trust for the purposes aforesaid." The testator then directed his estate at Dodleston to be sold within two years after his decease, and gave power to his trustees to dispose of the whole of his landed property, if they thought it prudent, the consent of his son being first had in writing. The testator then, after directing that all monies due to him on bond, &c., should be called in, and invested in government or real securities in the joint names of the trustees and of his son, devised and bequeathed as follows:—"In case my son shall die in the widowhood of his mother, and leave lawful issue, then I direct that his moiety or equal half-part of the proceeds of my property, personal and real, shall become the property of such issue, share and share alike; and that the principal of the said proceeds shall, upon the youngest of the said issue attaining twenty-one years of age, be divided amongst them, share and share alike; and if only one, then to such one; but this distribution to be made only in case my said son shall not attain twenty-one years of age, or attaining it, leave no will; if otherwise, then the said property to be subject to such division amongst the said issue as he shall by will direct. I direct also that the other moiety or equal half-part of my said

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property, together with the furniture, plate, &c., shall, upon the death or marriage of his mother, subsequent to my said son's decease, and leaving lawful issue, be subject to the same distribution as is before directed respecting his moiety; but in case of such his demise in the widowhood of his said mother, and without leaving lawful issue, then I wish and direct the whole of the proceeds of my property to be paid to her during her widowhood, subject to an annuity of 40*l.* per annum to be paid to Mr. Thomas Burrows, of Cheadle Hulme, schoolmaster, or his representatives, for the maintenance of the female part of his family, &c. And in case of the marriage or death of my present wife, my said son being dead, and leaving no lawful issue, then I give the whole of the proceeds of my estate, personal and real, to the Rev. Joseph Burrows, of Brazenose College, for his life, and his heir male, upon the condition of his taking and using, within twelve months after having possession of my property, the surname of 'Dickyn,' subject, however, to the above annuity." The will then contained limitations in favour of other members of the Burrows family, in the event of J. Burrows having no issue, or refusing to bear the name of Dickyn. In a subsequent part of the will the following clause occurred:—"If my son dies without attaining twenty-one years of age, and without leaving lawful issue, I give my books to the Rev. J. Burrows; and I do not wish my said son to have the indiscriminate use of my said books until he attains the age of nineteen years, though I now give them to him: my plate and furniture I direct to be his in the cases of the marriage or death of his mother; and should he be previously dead, leaving no lawful issue, I give them to the Rev. J. Burrows, or to him who shall bear the name of Dickyn, and inherit my other property."

The testator died in 1813, leaving his widow and son surviving him. In 1816 the trustees sold the Dodleston estate, and invested the purchase-money in the funds in

their joint names. In June 1831, the widow died. In September following, the son, Halliday Dickyn, who had attained the age of twenty-one, died intestate, and without ever having been married, leaving Joseph Burrows surviving him.

The bill was filed by Joseph Dicken (a), the heir-at-law of the testator, against the surviving trustees and Joseph Burrows, praying that the plaintiff might be declared entitled in fee to the unsold real estates of the testator, and absolutely entitled to the net proceeds of the sale of the Dodleston estate; that the trustees might be directed to make to the plaintiff the necessary conveyances and transfers, and might account to him for the rents and profits of the real estate, and the dividends of the stock in which the purchase-money for the Dodleston estate had been invested, from the death of Halliday Dickyn.

At the hearing of the cause, the plaintiff abandoned all claim to the personal estate of the testator, and to the proceeds of the sale of the Dodleston estate.

Mr. *Hodgson* and Mr. *Rudall* for the plaintiff.—It is a well settled rule of law, that if words of contingency contained in a will are express and unequivocal, the gift must be governed by that contingency, though the result may seem to involve an absurdity, or may be attended with inconvenience or hardship: *Denn d. Radclyffe v. Bagshaw* (b), *Doe d. Everett v. Cooke* (c), *Toldervy v. Colt* (d). Here the contingency on which Joseph Burrows was to take, was the death or marriage of the testator's widow, after the death of the son, leaving no issue. That contingency having been destroyed by the death of the mother

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(a) The plaintiff established his heirship to the testator on the father's side, notwithstanding the difference in the spelling of his name and that of the testator.

(b) 6 T. R. 512.

(c) 7 East, 269; 2 Smith, 236.

(d) 1 Y. & C. 621; 1 M. & W. 250.

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in the son's lifetime, the interest of Burrows is at an end, and the plaintiff is entitled. It is certainly open to conjecture, that the testator intended Burrows to take, at all events, upon the death of the son without issue; but the Court cannot indulge in such a conjecture in opposition to the express words of the will. Besides, if any latitude is given to conjecture, it is equally reasonable to suppose that the main object of the testator in framing these minute limitations, was to impose certain restrictions on his son during a certain period. He might not intend that his son should will away the estate, unless he survived his mother. The son being an infant, it might be thought necessary that he should be restricted in his power of disposition, or the testator might have some jealousy of his having that power in his mother's lifetime. This gives a rational construction to the will, upon the mere supposition of the testator's being a prudent man. But, dealing with the will according to the rules of law, the true construction of it necessarily excludes the notion of an estate tail in the son. The case of *Lees v. Mosley* (a) has set that question at rest. Besides, the power of appointment given to the son is sufficient to exclude any estate tail in him. Then is there any estate for life in the son, upon which the estate of Joseph Burrows can be supported? If there is neither one nor the other of these estates, how is he to take? It is observable that the estate given to the son's issue is limited to take effect during the lifetime of the mother. The testator must be presumed to have known the law, and he may have limited the estate in that manner, in order to avoid a perpetuity, and give the mother, in a certain event, a larger interest: *Pells v. Brown* (b), *Lady Lanesborough v. Fox* (c), *Holmes v. Lock* (d). Upon the whole, there is a clear gift to the mother for her life, and the estate limited

(a) 1 Y. & C. 589.

(b) Cro. Jac. 590.

(c) Ca. T. T. 262.

(d) In Dom. Proc.

to Joseph Burrows is a contingent remainder, expectant on the mother's life estate, and to take effect only in the event of the son dying without issue in the mother's lifetime. [*Alderson*, B.—That construction is strengthened by the clause which gives the furniture to Burrows, upon the death or marriage of the mother, should the son “be previously dead, leaving no issue.”] Then the event not having happened on which the contingency depends, the Court cannot alter the will: *Doo v. Brabant* (a). [*Alderson*, B.—The testator seems to have intended that his son should not make a will, unless he had issue.]

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Mr. *Temple* and Mr. *Hayter* for the defendants.—Where the words creating the contingency are so clear as to leave no doubt of the testator's intention, the Court is not at liberty to look beyond the particular clause in which the words occur. But where there is an obscurity in the expression of the contingency, so as to create a doubt whether it completely embraces the testator's intention, the Court will look at the general intention of the testator, and in many cases has gone to the extent of overruling the particular intention, in order to carry into effect the general intention. No man can say here what the particular intention of the testator was. He intended to give his wife a life interest in a moiety of the estate. He gives his son, in equally positive terms, a life interest in the other moiety. On the death of his wife, he directs her moiety to be disposed of in like manner as his son's moiety; that is, he gives it to his son for his life. Upon the determination of that estate, the property is given to the issue of the son. The Court may construe the word “issue” as “children,” so as to exclude any question of remoteness; in which case the children, if there had been any, would have taken as tenants in common in fee, subject

(a) 4 T. R. 706.

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to the father's power of appointment. The son took a life estate, capable of being enlarged into a fee, if he had a child attaining twenty-one; if otherwise, then only a life estate, with a power of disposition. Upon the death of the two tenants for life, or failure of issue attaining twenty-one, the testator devises his estate over, that is to say, he devises it, charged with an annuity of 40*l.*, to Joseph Burrows. It is said that the gift to Burrows is founded on an express contingency, which has failed. That construction is certainly tenable, if the general intention of the testator is to be entirely overlooked. But it is obvious that the testator's general intention was to give the estate to Burrows, on failure of his own immediate family. He intended to retain the estate in his own family so long as there was a widow or son, or children of a son in existence, but no longer. The clause which comprehends the gift to Burrows should be read thus:—"And in case of the marriage or death of my present wife, my said son being dead, or in the event of my son dying without lawful issue, then I give, &c." Or the words "my said son, &c." may be considered as included in a parenthesis, and read thus—"My said son dying and leaving no lawful issue." If the will be construed otherwise, the Court must come to the conclusion, that the testator meant to give the estate over to Burrows only upon a complicated contingency; but it is obvious that such was not his meaning. He had no intention to benefit his heir-at-law.

Mr. *Hodgson*, in reply, was stopped by the Court.

ALDERSON, B.—The contingency on which this estate is devised over is expressed in too clear terms to admit of any reasonable doubt. The testator first gives a moiety of the estate to his son for his life, and the other moiety to his wife for her life or widowhood, and directs that the latter moiety shall, upon the death or marriage of the wi-

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dow in the son's lifetime, go to the son in the same manner as the previous moiety. He then provides for the son dying during the widowhood of his mother, leaving lawful issue, in which case the issue are to take the son's moiety, (and also the widow's moiety upon her death or marriage), share and share alike; but at the same time if the son chooses to make a will, he is at liberty to do so for the purpose of providing for the issue, in such shares as he may think proper. But if the son die without issue, during the widowhood of his mother, then the testator devises the whole of the property to her for life, subject to an annuity of 40*l*. Then comes this clause—"And, in case of the marriage or death of my present wife, my said son being dead, and leaving no lawful issue, then I give the whole of the proceeds of my estate, personal and real, to the Rev. Joseph Burrows." Now, it appears to me that the whole of the devise to Mr. Burrows is subject to the contingency expressed in the former clause, relative to the property coming to the mother upon the death of her son, leaving no lawful issue. The contingency there expressed is recapitulated in the last clause, and is stated to be the marriage or death of the mother taking place at a time when the son is dead leaving no lawful issue. Those are the plain words of the testator. Whether he had any other intention than what he has expressed I cannot tell. The events on which, according to the expressed intention of the testator, the devise over is to take effect are, the marriage or death of the widow at a period after the death of the son, leaving no lawful issue. Neither of those events having taken place, the estate goes to the testator's heir at law.

Decree accordingly.

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Defendants, by their answer to a vicar's bill, denied the right of the vicar to the tithes claimed, alleging the right to be in the rector. Plaintiff then amended his bill, charging that the defendants ought to set forth what tithes the rector was entitled to, and how his right was made out. Defendants demurred to this part of the amended bill:—*Held*, that the demurrer was overruled by the answer.

SALKELD v. PHILLIPS.

THE bill was brought by the vicar of Crosley-upon-Edon, against certain occupiers within that parish, praying for an account and satisfaction of certain small tithes.

The defendants, by their answer to the original bill, admitted the collation and induction of the plaintiff, and that he was the lawful vicar of the above-named parish; but they denied his title to the tithes claimed, alleging the right and title to such tithes to be, and always to have been, vested in the rector for the time being of the parish, save and except so far as the same had been barred by the statute 2 & 3 *Will.* 4, c. 100. They also insisted, that if the plaintiff ever had title to such tithes, (which, however they did not admit), he was barred by the statute.

The plaintiff amended his bill, by charging that the defendants ought to set forth of which of the several titheable matters and things aforesaid by name, and within which of the lands occupied by the defendants respectively, the tithes do not belong to the plaintiff as such vicar as aforesaid, but belong to and ought to be paid to, the rector of the said parish; and that the said defendants ought to set forth of which of the said titheable matters the tithes belonged to the rector for the time being of the said parish before the said act, and have ceased to belong to him by virtue of the said act; and that they ought also to set forth how they make out that the right to such tithes did formerly, and before the passing of the said act, belong to the rector of the said parish and not to the vicar thereof, and by what means such right has been barred; and that they ought to set forth which of the said titheable matters and things the plaintiff is not entitled to the tithes of, by reason of the said act, or which of the lands occupied by the said defendants respectively, are thereby exempted from the payment of such tithes, &c.

The defendants demurred to so much of the amended bill as consisted of the charges relating to the rector's alleged title to the tithes; and as to the residue of the bill, they answered that they did not insist otherwise than in the manner, and to the extent mentioned, in their former answer, that the plaintiffs right had been barred by the statute.

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Mr. Boteler and Mr. Johnson, for the demurrer, contended that the plaintiff, who could only claim by the strength of his own title, had no right to enquire as to the rector's title. It was nothing to the vicar whether the rector was barred or not by the statute.

Mr. Simpkinson and Mr. Purvis, *contrà*, cited *Atkinson v. Hanway* (a), and contended that the original and amended bill forming but one record, the demurrer was overruled by the answer.

Mr. Boteler, in reply, referred to *Smith v. Bryon* (b).

ALDERSON, B.—It seems to me that the demurrer is overruled by the answer, the case made by the answer being totally inconsistent with that made by the demurrer. The demurrer proceeds on the ground that, admitting the plaintiff's right as stated in the bill, he is not entitled to the relief prayed; whilst the answer wholly denies the vicar's right.

I think the demurrer ought to be overruled on the ground that the original and amended bill form one record, and that the question demurred to is answered.

Demurrer overruled.

(a) 1 Cox, 360; see 2 Atk. 119.

(b) 3 Madd. 428.

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June 1st.

Filing a cross bill against a party who is in contempt in the original suit, is a waiver of such contempt on the part of the party who files it; and the defendant in the cross suit, by clearing his contempt in that suit, will clear it in both.

BEST v. GOMPERTZ.

IN March, 1834, a bill was filed by the defendant against the plaintiff, charging him with various frauds in certain money transactions which had taken place between the parties. The plaintiff put in an answer which was referred for impertinence, but the Master reported it not impertinent. The defendant then took exceptions to the Master's report, but the exceptions were overruled. The plaintiff then issued a *subpœna* for the costs of these proceedings, which, the defendant failing to pay, was committed to the Fleet. He afterwards procured himself to be removed into the custody of the Marshal of the King's Bench; whereupon an application was made to that Court for an order that he should be kept in close custody, but that application failed. Subsequently to these transactions, the plaintiff filed the present bill, by way of cross bill, against the defendant, for a discovery of facts in aid of his defence to the original bill. To the cross bill, the defendant having put in an answer and demurrer, the plaintiff took exceptions to the answer, and argued the demurrer. The demurrer being overruled, the defendant submitted to the exceptions.

The defendant having at length put in his answer to the cross bill, and having tendered 20*l.* as the full amount of the costs of his contempt in the cross suit, now moved to be discharged out of custody.

There was a cross motion by the plaintiff that the defendant should be kept in close custody within the Court of King's Bench till the contempt in both suits should have been cleared.

Mr. *Simpkinson*, for the first motion, contended that the defendant was entitled to his discharge notwithstanding that the costs of the contempt in the original cause

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had not been paid, inasmuch as filing a cross bill, and calling upon the defendant to answer, was a waiver by the plaintiff of any right which he might have previously had to treat the non-payment of costs in the original cause as a contempt in this cause: *Anon. (a)*, *Hoskins v. Lloyd (b)*, *Gray v. Campbell (c)*. He also urged, independently of the ground of waiver, that the plaintiff had no right, under any circumstances, to connect the contempt in the original cause with that in the cross cause: *Clarke v. Dew (d)*, *Ricketts v. Mornington (e)*.

Mr. *Elderton*, *contra*, contended that the defendant had no right to choose which matter he should discharge himself for, and that for the purpose of resisting this motion an original and cross cause were the same: *Ward v. Eyles (f)*, *Kemp v. Mackrell (g)*, *Wenman v. Osbaldis-ton (h)*. As to the question of waiver, the step taken must be with reference to the matter which makes the contempt. [*Alderson*, B.—A proceeding in the cause seems sufficient.] At all events, under stat. 11 *Geo. 4* and 1 *Will. 4*, c. 36, the defendant, in order to clear his contempt, must put in a full and sufficient answer, and that it is so, must appear by his own affidavit; for, if the plaintiff were to take an office copy of the answer, it would be a waiver of the contempt in both causes: *Sidgier v. Tyte (i)*. [*Alderson*, B.—The affidavit would only amount to the defendant's *ipse dixit* that he has put in a full answer.]

Mr. *Platt*, for the Marshal of the King's Bench.

Mr. *Simpkinson* in reply.

(a) 15 Ves. 174.

(b) 1 S. & S. 393.

(c) 1 Russ. & M. 323.

(d) Ibid. 103.

(e) 7 Sim. 200.

(f) *Moseley*, 377.

(g) 3 Atk. 812.

(h) 2 Bro. P. C. 276.

(i) 11 Ves. 202.

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ALDERSON, B.—The question is, whether the contempt has been waived so as to prevent the plaintiff from holding Gompertz in custody for the costs of more than the last proceedings; and it appears to me that it has. Therefore let the Master tax the plaintiff's costs of the defendant's contempt in not putting in his answer, and upon those costs, together with the costs of the demurrer and exceptions, (which have been already taxed), and the costs of this application being deposited by the defendant with his clerk in Court, let the exceptions be set down for argument. The plaintiff is not entitled, on this proceeding, to any costs in respect of the proceedings in the King's Bench, or in the cause of "*Gompertz v. Best*;" and with respect to those to which he is entitled, let him deliver his bill of costs within three days. The motion as to close custody must stand over till it is seen whether the answer is sufficient or not.

Order accordingly.

REYMER v. GUNSTONE.

July 11th.

Where a defendant had been in contempt for want of an answer, through the mistake of the Warden of the Fleet in refusing to take the answer, the Court ordered that the costs of the contempt should be costs in the cause; and, on failure of the plaintiff to take exceptions to the answer within a limited time, that the defendant should be discharged.

MR. JEREMY, for the defendant, moved that an order which the plaintiff had obtained in May last, for taking the defendant's answer, might be discharged, the defendant having put in an answer. In support of the motion, he read the defendant's affidavit, stating that the papers containing materials for his answer had been, in the first instance, detained by counsel; that when the answer was prepared, he applied to the Warden of the Fleet to take it, but that the Warden refused to do so, alleging that he had no authority; that after this had occurred, the order in question was obtained. *Jeremy* then stated the nature of the case as it appeared on the record, with a view

to shew that the circumstances, as there disclosed, were favourable to the defendant; and he contended that under the stat. 11 *Geo.* 4 and 1 *Will.* 4, c. 36, s. 15, rule 17, the Court had a discretionary power in regard to the costs of the contempt, and that in this instance they ought to be made costs in the cause. The affidavit stated that the defendant was unable to pay the costs.

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Mr. *Stevens*, *contra*, said that the order now sought for could only be made on payment, by the defendant, of the costs of the contempt, and on his making it appear to the Court that the answer was sufficient. In this case it appeared, from the copy that had been served on the plaintiff's solicitor, that the answer was insufficient.

ALDERSON, B.—The defendant says that he would have put in his answer, but for the mistake of the Warden of the Fleet. Under all these circumstances, I think that the costs should be costs in the cause. Upon the other point I am sorry to be obliged to make a precedent against the defendant; but it is a useful rule, that the party against whom a bill is taken *pro confesso* should inform the other party what the nature of his answer is. The particular inconvenience in this case is not so bad as the general inconvenience that would result from a contrary practice. The plaintiff, therefore, must have time to take exceptions to the answer, but if he does not do so within a fortnight, let the party be discharged. As the Court will not sit at that time, the Master will undertake, in this particular case, to look into the exceptions.

Order accordingly.

1837.

June 26th.

July 5th.

STORY v. JOHNSON.

Where one of several tenants in common has conveyed away his share of the estate, in distinct portions, to different individuals, upon a bill subsequently filed for a partition of the whole estate, the Court, in making its decree, will have regard not merely to the legal rights of the original tenants in common, but to the equitable rights of all parties actually interested in the estate; it will,

therefore, carry the object of the bill into effect, by directing a distinct partition of each of the several portions of the estate in which the alienees of the *quondam* tenant in common respectively have an interest. Therefore, where A., B., and C. were tenants in common, in undivided thirds, of an estate comprising Blackacre and Whiteacre, and C. conveyed his interest in Blackacre to D., and his interest in Whiteacre to E.; upon a bill filed by A. and B., for a partition of the whole estate, the Court (reversing a former decree, which had sanctioned a different mode of partition) directed that Blackacre should be divided into three parts, and each part should be conveyed to A., B., and D. respectively; and that Whiteacre should be divided into three parts, and each part should be conveyed to A., B., and E. respectively.

A court of equity, in decreeing a partition, does not act ministerially, and in obedience to the call of those parties who have a right to the partition, but sounds itself upon the general jurisdiction given to courts of equity. It will, therefore, on a bill of partition, adjust the equitable rights of all the parties interested in the estate; and will, for that purpose, give special instructions to the commissioners of partition, and even, in cases of necessity, nominate the commissioners.

A court of equity, in decreeing partition, will have regard to the provisions of the statute 8 & 9 Will. 3, c. 31, s. 4.

Tenant for life, with remainder to A., B., and C., as tenants in common in fee, granted a lease of the estate to D. for twenty-one years, which lease was confirmed by A. and C.:—*Held*, that the lease was good as against A. and C., and that B. could not impeach it in a suit for partition in which he was co-plaintiff with A.

Where a party takes a lease of an infant's lands, and the infant, on coming of age, mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease.

Facts which have occurred since the decree, and which, therefore, were not comprehended in the pleadings, may be proper ground for a rehearing, if they shew error in the decree.

After leave has been given for a rehearing in the Court of Exchequer, it is unnecessary for the petitioner to state in his petition of rehearing in what respect he conceives the decree to be erroneous, or what is the nature of the decree he seeks.

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of this order, the Lord Chief Baron, after hearing the arguments of counsel, said that he adhered entirely to the observations which he had made on the former occasion, thinking that those observations, as reported, were not in the slightest degree stronger than were warranted by the circumstances of the case.

On the 15th of July, 1836, the plaintiffs moved for a new commission, but that motion was ordered to stand over, in order to give the defendants an opportunity of having the cause reheard for the purpose of varying the decree.

On the 16th December, 1836, the Court, upon the petition of the defendant Johnson, and after hearing the arguments of counsel (a), ordered, that notwithstanding the decree made on the original hearing had been made upwards of six months, the petitioner should be at liberty to present a petition to have the cause set down for hearing, for the purpose of having the decree altered or varied.

In consequence of this order, the defendant Johnson presented his petition for the purposes mentioned in the order. The petition, which was signed by counsel, after stating the various proceedings in the suit, and setting forth at length the decree and the Master's report consequent thereon, stated that the petitioner felt himself aggrieved by the decree, but assigned no reason for his complaint, nor suggested in what particulars the decree was erroneous.

The cause coming on for rehearing,

Mr. Temple and Mr. Phillimore objected that the order for the rehearing had been obtained *ex parte*, and said

(a) On the argument of this petition, the following cases were cited on behalf of the petitioner: *Fawcett*, 3 P. W. 242; *M'Lachlan v. Rob*, 1 Y. & C. 267; *Halford v. Halford*, 1 Y. & C. 270; *Watson v. Duke of Northumberland*, 11 Ves. 153; *Fox v. Bardwell*, 2 Wood, 338; *Mills v. Banks*, 3 P. W. 1; *Buck*

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that, although the defendant had obtained leave to present a petition of rehearing, it did not therefore follow that he was entitled to have the cause reheard. [*The Lord Chief Baron*.—You had an opportunity of making your objections when the petition for leave to rehear was argued. Is there any instance of opposition being made to the ordinary petition of rehearing signed by counsel?] *Nevinson v. Stables* (a), is an authority to shew that such opposition may be made. Here there are two grounds of opposition. First, the petition does not state what decree it is that the petitioner requires, but only that he is aggrieved by the former decree and wants a new one. The petitioner ought to have given notice of the nature of his objection: *Fow. Prac.* vol. 2, p. 200. The other objection is, that the petitioner states new facts which are not in the pleadings, as a reason for rehearing the cause. After stating the bill, answer, and decree, it goes on to state the proceedings of the commissioners, and that they came to such and such conclusions. It then alleges, that those conclusions are wrong, and that, in order to avoid the effect of them, the Court ought to rehear the cause. But *Nevinson v. Stables* decides that the cause ought only to be reheard on the pleadings. Besides, the petition states an acquiescence under the decree. The party has joined in the commission and named commissioners. There has likewise been a reference to the Master to charge the defendant with the payment of money. After acquiescence a rehearing will not be permitted: *Macartney v. Blackwood* (b), *Wood v. Griffith* (c). [*The Lord Chief Baron*.—In the party's attempt to act under the decree he may discover the error in it.]

Mr. *Simpkinson*, for the petitioner, *contrd.*—Upon the point of acquiescence, there are much stronger cases than

(a) 4 Russ. 210.

(b) *Ridgw., Knapp, & Sch.* 602.

(c) 1 Mer. 35; 19 Ves. 550.

the present; for instance, *Brophy v. Holmes (a)*. As to the other objection, notwithstanding the dictum in Fowler, it is not the practice in the Exchequer, upon a rehearing or appeal from the whole decree, for the appellant to state what decree he thinks the Court ought to direct. The practice in this Court is similar to that in the House of Lords, where the appellant gives no reason for his appeal.

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Mr. Temple, in reply, cited *Smith. Chan. Pr.* vol. 2, p. 44, and *2 Eq. Abr. Title, Appeals*, and contended that upon petition for leave to present an appeal in the House of Lords, the party is bound to state his reasons. [*The Lord Chief Baron*.—He is not bound to do so. He may bring his appeal something in the same way as he would bring a writ of error at law, alleging simply that the decree was for the plaintiff, whereas it ought to have been for the defendant. But there is no general rule on the subject. In the Douglas cause, before Lord Thurlow, various minute reasons were given, forming almost a volume.]

THE LORD CHIEF BARON.—I am of opinion that as the cause now stands, the plaintiff can raise no other objection to the rehearing than he might have done had the defendant presented his petition within six months after the cause was originally heard. The whole effect of the late proceedings has been to put the cause in that situation; and, therefore, any other objections than such as might have been urged within that period come to late.

Two objections, however, have been made which it is competent for the party to take at the present stage of the proceedings. One of them is, that the petition embraces facts which were not before the Judge who pro-

(a) 2 Molloy, 1.

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nounced the decree. If these facts existed before the decree, and there was otherwise no error in the decree, they could not be ground for rehearing; and the petition would be dismissed, because the Court could not act upon such facts. But that observation does not apply to facts which have occurred after the decree, or shew error in the decree. Suppose, after ten years spent in the Master's Office, the parties find themselves aggrieved by some erroneous practice, originating from an error in the decree. In that respect a statement of subsequent facts may be of great use upon a petition for rehearing. In such case complaint may reasonably arise out of facts which may have signified nothing to the Judge who determined the cause at the original hearing. I do not find it suggested that any fact here stated occurred before the decree, or might have been used as a ground for the decree. That being so, I think this case is not within the authorities cited by Mr. *Temple*.

Then as to the objection that the petition states no reasons for the rehearing. Certainly, if it be the practice for the party seeking a rehearing, if he means to review the whole decree and alleges error in all parts, to set forth what decree he conceives he ought to have—or, supposing the party to object to particular parts only of the decree, if it be the practice for him to state in what respect he conceives those parts to be erroneous, then this petition does not comply with that practice. If, on the other hand, the practice is not as I have just stated it, the petition is correct. Upon that I shall make no final order till I find from the books what the practice is; though, I confess, I should be glad if the gentlemen on both sides would agree upon it, rather than leave it to my investigation.

I have consulted Lord *Lyndhurst* upon the subject of the decree, and he entirely coincides with me in the opinion that it was erroneous in this respect—that Johnson

might by means of it be compelled to take that part of the property in which he has no interest. In fact the parties are placed in that situation that, upon a division of the property into three parts, they might all have parts in which at present they have no interest. I throw this out for the consideration of the plaintiffs' counsel.

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His Lordship having pronounced this judgment, the plaintiffs' counsel agreed to waive the objection which had been made as to the form of the petition; but as the plaintiff, Story, persisted in his opposition to the proposed variation in the decree, the cause was now reheard on the merits. The principal facts of the case having been already stated (a), it will be unnecessary to add more than a few particulars.

The purchase made by the plaintiff, Story, of the share of Edward Jones in the property in dispute, was effected by means of certain indentures dated the 9th of April, 1824, whereby that share was conveyed to George Raby and his heirs, in trust, for securing an annuity of 53*l.* to John Davies, and subject thereto in trust for Story in fee; and it was declared, that the annuity was secured to John Davies, in trust for Edward Jones and Elizabeth his wife, for their joint lives, and the life of the survivor of them, and, after the decease of the survivor, in trust for Richard Jones and his assigns for his life.

The purchases made by the defendants, Joseph Johnson and James Gardner, of Richard Jones's share of the property, were effected by separate conveyances to each of those parties, by indentures of lease and release, dated the 26th and 27th of June, 1826; the conveyance to Johnson comprising Richard Jones's share in the George Inn, and nine acres of land adjoining, and that to Gardner comprising Jones's share of the remainder of the property.

(a) Ante, Vol. 1, p. 538.

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It appeared, however, that the contract for sale had originally been made with Johnson alone, who acted as agent for Gardner as to the purchase made by the latter.

The plaintiffs in the original bill were John Story, Edward Jones and Elizabeth his wife, George Raby, William Standard Jones, and Richard Jones; the defendants were Joseph Johnson, James Gardner, and Joseph Davies. The bill prayed a partition of the Ifield estate, an account of the rents and profits received by the defendants, Johnson and Gardner, since the death of Richard Hall, and that, in case it should appear that the last named defendants had held in their own occupation any parts of the estates beyond the respective shares which should be allotted to them, then that it might be referred to the Master to fix a fair occupation rent on the same, &c.

The defendant Johnson, by his answer, insisted that, in addition to his one third share of the fee simple in the George Inn, with the appurtenances, which he had acquired from Richard Jones, he had also a present interest for twenty-one years in the entirety of that part of the property, by virtue of a lease made to him thereof by Richard Hall in November, 1820; which lease he alleged to have been confirmed by all the remainder-men. It appeared in evidence that a memorandum of confirmation had been endorsed on the lease, and signed by Edward Jones, who was then of age, and by his brothers, who were then minors; and that Edward Jones and his father had, at the same time, executed a bond to the defendant, for securing the ratification of this instrument by the minors when they came of age. The lease was afterwards virtually confirmed by Richard Jones, on coming of age, by the sale of his share of the property to Johnson; but it did not appear to have been confirmed by William Standard Jones, unless the mortgage which he executed to Johnson of his one-third share amounted to a confirmation.

The defendant, Gardner, by his answer, relied in like

manner on the leases and confirmations of leases of the parts of the property in which he was in the possession.

In January, 1831, the defendant, James Gardner, died, leaving his daughter, Elizabeth Jane, the wife of Henry Arnett, his heiress-at-law, and having by his will appointed his wife, Sarah Gardner, and also his daughter and her husband, to be the executors of his will. The suit was accordingly revived against those persons.

In February, 1832, the defendant, Joseph Johnson, died, having by his will given and devised all his undivided third share in his freehold estate called the George Inn at Ifield, with the appurtenances, and also the lease under which he held the entirety of those premises, to his son Joseph Johnson, his heirs, executors, administrators, and assigns; and having appointed Thomas Smith and Nathaniel Miller his executors. The suit was accordingly revived against Johnson the son, Smith, and Miller.

In the last mentioned bill of revivor, it was suggested by the plaintiffs, that, notwithstanding the expressions in the will of the testator, Joseph Johnson, he was not, at the time of his death, the holder of any good and valid lease of any part of the premises, and therefore that the devise contained in his will respecting such lease was nugatory, invalid, and of none effect. The bill then, after praying revivor in the usual manner, prayed that, if necessary, the said lease, or alleged lease, might be declared null and void.

The present defendants insisted on the validity of the leases and confirmations made to the original defendants, Johnson and Gardner.

By the decree made on the hearing of this cause on the 5th of August, 1833, it was ordered that a commission of partition should issue in manner and form as before stated (a); and it was ordered, that the premises to be

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allotted to the plaintiff, Story, should be conveyed to him in fee, subject to the trusts of the indentures of the 9th of April, 1824; and that the premises to be allotted to William Standard Jones should be conveyed to the defendants, Smith and Miller, and their heirs, by way of mortgage, for securing what should remain due on the mortgage made by William Jones to Johnson the father, but subject to redemption by W. S. Jones, his executors, &c.; or, in case the mortgage should be paid before the time of such allotment or conveyance of the premises, then to the use of W. S. Jones in fee. And it was further ordered, that the premises so to be allotted to the defendants, Joseph Johnson, Sarah Gardner, Henry Arnett, and Elizabeth Jane, his wife, should be conveyed to them in fee simple, in such parts and proportions, and in such manner, as they might direct. And it was further ordered, that the two several leases, dated respectively the 3rd of November, 1820, from Richard Hall, the son, to the defendants, Joseph Johnson and James Gardner, and also the lease from Richard Hall, the son, to the defendant, James Gardner, dated 29th of May, 1819, were not binding as to the third part or share of the plaintiff, William Standard Jones, of and in the estates and premises in the said pleadings mentioned. And it was thereby referred to the Master to take an account of all the rents and profits from the death of Richard Hall, in the said pleadings named, of the messuages and premises, with the appurtenances, called the George Inn, and of all and singular other the messuages or tenements, lands, and premises, contained in the said indenture of lease, bearing date, &c. (the lease to Johnson). And it was further ordered, that the defendants, Johnson, Smith, and Miller, should be charged with a fair occupation rent, from the decease of the said Richard Hall, in respect of such messuages or tenements, lands and premises; and it was thereby referred to the Master to take an account of the rents and profits, from the death

of the said Richard Hall, of all and singular the messuages and premises contained in the two several indentures of lease, bearing date, &c. (the leases to Gardner); and that the defendants, Sarah Gardner, Henry Arnett, and Elizabeth his wife, be charged with a fair occupation rent, from the decease of the said Richard Hall, in respect of such messuages and premises, &c.

The main object of the defendants, in seeking to vary the decree, was to have those parts of it altered which related to the appointment of the commissioners and the division of the property, and which declared the leases to be void as against William Standard Jones.

Mr. *Temple* and Mr. *Phillimore* for the plaintiffs, in support of the decree.—The purchase made by Johnson was legally of the whole of Richard Jones's share, though he afterwards agreed to divide that share with Gardner. By the terms of the contract between Johnson and Richard Jones, the latter was to convey to Johnson, or as he should direct. His directing a portion of the property to be conveyed to Gardner does not vary the nature of the original contract, which was solely between Johnson and Richard Jones. Therefore, for the purposes of this suit, Johnson must be considered as having purchased the entire share of Richard Jones.

With respect to the leases, it is clear that they were invalid in their inception, having been made by a party who was only tenant for life; but it is contended that they are rendered valid by the memorandum of confirmation. [The *Lord Chief Baron*.—Against Edward Jones only, not against the minors.] Unless all have confirmed, the leases are void. The parties being tenants in common, no lease of the whole, by one only, would be good against any. One tenant in common cannot grant a lease of any part. It must be a joint lease by all or none. No man can have a right of possession against a tenant in common, who has

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not executed a lease. [The *Lord Chief Baron*.—A tenant in common may lease his undivided part.] That would only entitle the lessee to rents and profits, but not to possession. [The *Lord Chief Baron*.—It places the lessee for the time being in the same situation as the tenant in common himself.] A lease is a demise of a right of possession; and one tenant in common cannot convey a right of exclusive possession. Here, the lease purports to be of the whole estate under a reserved rent recoverable upon the whole. Except it is a good lease of the whole, it is a good lease of nothing. It will not operate as a good lease of an undivided third part. Upon the covenant to pay rent, you could not bring an action for a portion. [The *Lord Chief Baron*.—It is clear that a court of equity would compel the execution of a lease of one third in that case.] At any rate, the Court cannot make a declaration as to the validity of the lease in a bill of partition. If the bill had been to set aside the lease, it would have been multifarious.

It is asked to make a special decree. But in case of partition, the Court has less discretion than usual. It has a mere concurrent jurisdiction with a court of law as to a writ of partition. The Court is, what the Chancellor is on the common law partition, namely, the issuer of the writ. The court of equity issues it under its seal. The form of the writ is matter of notoriety. If Lord *Lyndhurst's* decree is varied, it will be a case of the first impression. There is no case in which the form of the commission, or of the order for the commission, has ever been varied. When the title is proved, as it is in this case, the Court declares the plaintiff entitled to a commission. Upon a writ of partition at law, when the party had proved his right, the Court ordered the jury to be summoned. The duty of the Court in ordering it, and the duty of the jury, were distinct. So the duty of a court of equity in ordering the commission, and the duty of the commissioners, are

distinct. If the matter were within the cognizance of the Court, commissioners would not have been appointed, but there would have been a reference to the Master. [The *Lord Chief Baron*.—That may be an argument against the Court reviewing the proceedings of the commissioners, but it is difficult to see how it applies here.] We contend that there is no instance in which the Court has given any specific direction as to the writ of partition. The Court can only make partition of the original estate in common. To hold otherwise would be to say that the plaintiffs shall not have two-thirds of the entire estate, but two-thirds of a part here, and two-thirds of a part there. That would be to let in the mischiefs contemplated by the statute (a). The Court, therefore, will make division of the property without reference to existing circumstances, upon the ground that one tenant in common cannot create a particular interest in the property, either for himself or any other party, to the detriment of the other tenants in common: *Warner v. Baynes* (b), *Low v. Franks* (c), *Swan v. Swan* (d), *Seton on Decrees*, 488.

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Mr. *Simpkinson* and Mr. *Bichner*, for the defendants, Johnson, and the executors of Johnson the father.—The first question is, whether a declaration can be made against the validity of the leases in a suit framed like the present. The principal plaintiffs are Story, who purchased Edward Jones's share after the confirmation; Edward Jones, who has a remaining interest in consequence of the annuity; William S. Jones, who *quoad* the confirmation, is a stranger; and Richard Jones, the remaining tenant in common, and who sold his interest in the premises to Johnson and Gardner. Now, it is impossible to say that Edward Jones could impeach these leases. In the absence of any fraud, and he alleges no fraud against the defendants, he must be

(a) 31 Hen. VIII. c. 1.

(b) Amb. 589.

(c) 1 Molloy, 137.

(d) 8 Price, 518.

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bound by his own deeds. If, then, as against him the leases are good, how can they be impeached in a suit in which he is a co-plaintiff? The plaintiffs are married together for the purposes of the suit. An instrument or act which is binding on one is binding on all. No two persons can stand together as plaintiffs, the one admitting and the other denying the validity of a deed: *Wentworth v. Turner* (a), *Hunter v. Richardson* (b), *Cholmondeley v. Clinton* (c), *Jones v. Garcia del Rio* (d), *Bill v. Cureton* (e). And the general rule, that the plaintiffs must have a community of interest, has been settled by a variety of cases, ending with *Glyn v. Soares* (f). It is obvious, therefore, that so much of the decree as declares these leases void against any party is erroneous. *Whaley v. Dawson* (g).

Again, the decree is erroneous in directing that the whole property shall be divided into thirds. It is said that the conveyances to Johnson and Gardner only operated as a conveyance of an undivided third of the whole. The proposition is, in truth, that a man having an undivided third part in a property held in common, cannot convey a portion of it to any person. Is it meant to be contended, that before the statute of *Henry 8th* one tenant in common could not convey in this manner? Yet that statute does not alter the law, but only gives power to a tenant in common, or joint-tenant, to compel a partition. The conveyance of one third in different portions to different parties, does not prevent the other tenants in common from holding as they did before. They would hold the George Inn in common with Johnson, and the rest of the property with Gardner. Your Lordship, on some former proceedings in this suit, put a question which decides the whole case.

(a) 3 Ves. 3.

(b) 6 Madd. 89.

(c) Turn. & Russ. 107.

(d) Ibid. 297.

(e) 2 M. & K. 503.

(f) 3 M. & K. 450.

(g) 2 Sch. & L. 367.

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Suppose several persons to hold lands in Yorkshire and in Middlesex, under one title, as tenants in common, could not one of the tenants in common deal with his interest in each county as he thought fit? Could it be contended, that having sold his interest in one county, the purchaser might afterwards, on a partition, be compelled to take an interest in the other county? Such a proposition is not only contrary to justice, but at variance with the authorities. In a case mentioned by *Viner* (a), thirteen men having joined in the purchase of a manor, the conveyance was of a moiety to one of them in fee, and the other moiety to the other twelve in fee: the twelve made a feoffment to J. S. of twelve several tenements, and J. S. made twelve several feoffments to those twelve; now the thirteenth man who had the other moiety, brought one writ of partition against them all, pretending that they held *insimul et pro indiviso*; and by the opinion of the whole Court it would not lie, but he ought to have brought several writs. Other authorities incidentally illustrate the same proposition: *Co. Litt.* 186. b. 193. b. If one joint-tenant can bind his companion surviving him, by a lease for years *herbagii terræ*, it follows *a fortiori* that he can grant a portion of the estate itself. The inconvenience arising to the companion cannot be greater in the one case than in the other.

in remarks on this case - cited 47 a.C. 2a. 580

Upon these authorities it is submitted that the decree directing the property to be divided into thirds, and directing mutual conveyances of the several thirds to the respective parties, is erroneous. Certainly, if the decree be acted upon in this respect, the effect will be to merge the interest of Johnson in that of W. S. Jones and Story. It is said that a partition in equity is a matter of right, and that the Court has no power to direct a partition in any other than the ordinary form. There is no

(a) *Anon.* Brownl. 157; S. C. 16 *Viner Abr.*, Partition (S.), pl. 14.

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authority, however, for that proposition; on the contrary, it is clear, from several cases, that the Court, in directing a partition, will have regard to all equitable circumstances, and will give special directions to the commissioners, or even name the commissioners. *Swan v. Swan* (a), which has been cited for the plaintiffs, is rather an authority against them. What was the result of that case? No commission was granted. The tenant in common was in possession, and had laid out money on the premises; and although it was asserted that a commission of partition was a matter of right, and the Court had nothing to do but to issue the writ, yet the Court directed an inquiry as to the nature and value of the improvements. Again, in the case of *Lord Clarendon v. Hornby* (b), where there were two parties, one having two-thirds, and the other one-third of the estate, Lord *Macclesfield* directed that the party having the two-thirds should have the house and park, making compensation to the other party.

There is another objection to the decree, namely, as to the mode of appointing the commissioners. The effect of the decree, in this respect, is to give a majority of the commissioners to Story and W. S. Jones. The commission should be directed to persons to be therein named, and the order should be that each party do join in striking commissioners: *Smith v. Ilderton* (c), *Watson v. Duke of Northumberland* (d), *Smith Chan. Pr.* 860.

Mr. *Lane*, for the defendants, the representatives of Gardner, was proceeding to address the Court, when the plaintiffs' counsel objected that he could not be heard, inasmuch as the parties for whom he appeared had not joined in the petition of rehearing.

THE LORD CHIEF BARON.—In common justice he has

(a) 8 Price, 518.

(b) 1 P. W. 446.

(c) In Ch. not reported.

(d) 11 Ves. 163.

a right to be heard upon the whole of the matters that affect his clients.

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Lane then proceeded with his argument, addressing himself principally to the evidence in the cause,

Mr. *Temple*, in reply.—The objection as to misjoinder of the plaintiffs only holds on demurrer; not after years have elapsed and a decree has been had. It is, in fact, an objection for multifariousness; and that can only be disposed of by demurrer. The question as to the validity of the leases might be decided with proper materials, but the leases cannot be declared valid against Edward Jones without knowledge of the circumstances under which they were made. [*The Lord Chief Baron*.—The bill suggests no fraud upon Edward Jones for the purpose of obtaining the confirmation.] It was dealing with an expectancy, and the defendants ought to shew that the confirmation was founded on good consideration. If the lease is void at law it cannot be set up in equity. Upon the main objection, as to the rights of division, it has never yet been heard that a tenant in common, who has done nothing to embarrass the estate, coming here for a partition, is to have his bill dismissed because somebody else has embrangled his part of the estate. No decree for partition has ever yet been made in which the estates created by the partition have not been made to correspond with the estates created by the original trust. Here, the estate having been an estate in common in thirds, the partition must be in thirds. Originally partition could only have been had in respect of the estates of parceners, who were a given set of persons. Richard Jones could not make a tenancy in common different from that made by the testator's will; and his assignees take with knowledge of the will. How could he place his assigness in a better position than himself? In *Clarendon v. Hornby*, Lord *Macclesfield* re-

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commended a particular mode of division, but he did not say that he could enforce his recommendation by a decree, nor was the decree in that case made with any such recommendation. Lord *Eldon* felt the same difficulty in *Watson v. The Duke of Northumberland*, and probably what was there done was done by consent. The case in *Brownlow* is at variance with all the other authorities, a circumstance which is noticed in *Allnatt on Partition*. The right of partition cannot be affected by the sub-contract of a tenant in common.

July 5th.

THE LORD CHIEF BARON.—This is a rehearing of a cause that was the subject of a decree of Lord *Lyndhurst*, upon a bill of partition of certain lands in the county of Sussex, comprising, amongst other premises, an inn or public-house and nine acres of land, placed under peculiar circumstances. It appears, by the undisputed facts of the case, as stated in the bill, admitted by the answer, and proved by the evidence, that Richard Hall was, under the will of a relation, seized as tenant in tail (a), of the premises in question, with remainder in fee to Edward Jones, William Standard Jones, and Richard Jones, as tenants in common. The premises consisted of a certain estate in the parish of Ifield, in the county of Sussex, and of an inn called the George Inn, at Crawley, in the same parish. It appeared that Mr. Hall, during his lifetime, granted a lease of the George Inn and some cottages, with about nine acres of land, to a person of the name of Johnson, the original defendant in this cause, for twenty-one years; and that he also granted leases, one or more, to a person of the name of Gardner, of certain other premises forming part of the estate in question, for the same term. In 1821, during the lifetime of Hall, the tenant in tail,

(a) At the original hearing it was made a question whether Richard Hall was tenant for life or in tail, but for the purposes of the rehearing it was immaterial.

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Edward Jones, who was then of age, and William Standard Jones, joined in signing upon the back of those leases a confirmation of them; and inasmuch as William Standard Jones was under age, and Richard Jones was also but sixteen years of age, Edward Jones, the elder brother, and his father, entered into a bond of indemnity to Johnson and to Gardner in the sum of 500*l.* for the purpose of securing to them a confirmation by William Standard Jones when he should become of age, he being then about twenty, and by Richard Jones. This confirmation was made for a valuable consideration; it is indorsed upon the leases, which is the act of confirmation, and it is expressed to have been made for 90*l.*; but I think it was stated in the answer, or in some of the proceedings, that only 60*l.* had been paid, and I presume, from that circumstance, that the sum was divided into three parts, and that Edward Jones obtained his part, and William Standard Jones, who was twenty years of age, probably had his, and that the other part was reserved until the younger man came of age. After this confirmation Hall died, and after the death of Hall, it appears that Mr. Story, one of the plaintiffs, purchased the interest of Edward Jones for an annuity of 53*l.* a year for the life of Edward Jones. It appears, also, that Mr. Johnson purchased of Richard Jones, when he came of age, all his interest in the George Inn, the cottages, and the nine acres of land; and about the same time Gardner purchased the interest of Richard Jones in all the remaining portion of his one-third. Those purchases were made, I think, altogether for a sum approaching nearly to 2,000*l.* It seems, also, that in the year 1829, William Standard Jones borrowed of Johnson, upon mortgage of his one-third undivided share, the sum of 600*l.*, which still remains unpaid. That being the state of the parties, a bill is filed by Story and the Joneses for a partition. The facts are stated in the answers, and proved in the evidence, as I have just now stated; and

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although, when the case was reheard before me, some question was made about the purchase of the interest of Johnson, I am surprised, on looking at the bill and the answers, to find that the very facts that are in controversy are both stated in the bill and in the answers, and proved by the evidence. It is perfectly clear, from the evidence, that at the time the bill was filed the position of the parties was this—that Edward Jones, or rather Story, standing in his shoes, and W. S. Jones and Johnson, were tenants in common of the George Inn, of the cottages, and nine acres of land; and that Story, as representing Edward Jones, W. S. Jones, and Gardner, were tenants in common of the remaining part of the original estate, in which remaining part Johnson had no *scintilla* of interest, any more than Gardner had in the public-house called the George Inn, the cottages, and the nine acres of land.

In this state of things, a bill for a partition is filed by Story and Edward Jones, and William Standard Jones, against Johnson and Gardner. Now, upon the facts stated in the answer, and which I have adverted to, it might be a very considerable question whether that bill could have been sustained, as it is perfectly clear that at common law, had the parties been disposed to proceed at common law, upon a writ of partition, there must have been two writs of partition, inasmuch as the parties were not all interested in the same subject-matter of the partition. I take that to be perfectly clear, not only upon principle, but decided cases. It might, therefore, have been at least a question, whether or not such a bill could be sustained, had the objection been made; but the objection was not made, and perhaps very properly; because, as all parties were willing to come to a partition, it would have been only an additional expense to have put them to file another bill. It is certainly clear, that if Johnson had sought a partition of his interest, he could not have made Gardner a party to the bill, because Gardner had no earthly interest in the only

subject-matter in which Johnson was interested; and, in like manner, if Gardner had sought a partition, he could not have made Johnson a party to the bill. But, however, as the case is reversed, and the parties who filed the bill were themselves all interested, although the defendants were not all interested in the same subject-matter, the objection could not be taken *in limine*; and as it was not argued at any period of the case, I consider it as passed over, and I only advert to it now for the purpose of illustrating the principle on which I think I am bound to decide this case.

Now, the first question is, how to deal with these leases. I find that, in the decree made by Lord *Lyndhurst*, he does not take any notice of the lease granted to Johnson, or of the confirmation of that lease by Edward Jones, but that he does take notice of the interest in that lease which it might be supposed William Standard Jones has; because, as against him, he declares that the lease is not binding. That arises out of the bill of revivor and supplement, in which the two plaintiffs call upon the Court to set aside, if necessary, the lease that had been stated in Johnson's and Gardner's answers. Now, looking with some anxiety into the authority of the Court in this matter, and to the claims of the parties, it appears to me that the statute 8 & 9 *Will. 3*, c. 31, obliges me to take notice of that lease, and that the mode adopted by a court of equity for settling partitions of joint estates must follow the principle and the rules of law; otherwise, that the court of equity would do great injustice. Now, in the 4th section of that statute there is an express provision, "in case such partitions be made." That statute was made for the purpose of giving further facilities to parties entitled to writs of partition at law; and it enacts, that "in case such partition be made, returned, and filed, he or they that were tenant or tenants of any of the said messuages or lands, tenements and hereditaments, or any part or parts thereof,

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before they were divided, shall be tenant or tenants for such part set out severally to the respective landlords or owners thereof, by and under the same conditions, rents, covenants, and reservations, where they are or shall be so divided; and the landlords and owners of the several parts and purparts so divided and allotted as aforesaid shall warrant and make good unto the respective tenants the said several parts severally after such partition, as they are or were bound to do by any copies, leases, or grants of their respective parts before any partition made; and in case any demandant be tenant in actual possession to the tenant to the action for his part and proportion, or any part thereof, in the messuages, lands, tenements, and hereditaments to be divided by virtue of a writ of partition as aforesaid, for any term of life, lives, or years, or uncertain interest, the said tenant shall stand and be possessed of the said purparts and proportions for the like term, and under the same conditions and covenants when it is set out severally in pursuance of this or any other act, statute, or law to that purpose." Now it appears to me, that I could not with propriety make an order for a partition of these estates, without reference to the interest of the parties in this lease, which interest is brought before me by the proceedings in the case; and therefore it becomes important that I should state whether the lease so granted to Johnson is a subsisting lease against all or any of the parties. Now, it appears to me that it is a good lease as against Story, because Story represents Edward Jones, and Edward Jones gave a confirmation of this lease, which was clearly binding at law, for a valuable consideration, and which he could, under no circumstances, retract; because it has been settled by decided cases, that if tenant for life grant a lease for a certain number of years, and the tenant in remainder in fee confirm that lease during the life of the tenant for life, such confirmation is binding on the tenant in fee.

My opinion, therefore, is, that Edward Jones having received a consideration for the confirmation of this lease, and having confirmed it, Story, who purchased his interest after that confirmation, is bound by that lease. The same may be said of Gardner as to his portion, though a distinct portion, of the premises. With respect to W. S. Jones, there is nothing to shew that he was bound by the lease; but I think I am not at liberty to declare, by any proceeding in this case, that, as against him, the lease is void; and for this reason; that the prayer upon that subject is introduced into a bill filed by Edward Jones and W. S. Jones; and it appears to me that I could not have entertained such a bill, had its only object been to set aside that lease. Suppose this had been an original instead of a supplemental bill: the parties would then have appeared as plaintiffs, jointly praying to set aside a lease which had been confirmed by one of them, without the least suggestion of any fraud or imposition on him when he confirmed it. Under such circumstances, he clearly could not join in a prayer with another person who had an inconsistent interest, praying that the interest of that person should be fortified by his joining in the prayer; and the bill would have been dismissed. For these reasons, it seems to me that I cannot make this supplemental bill the ground of a declaration that the lease in question is void; but I say nothing about it, because nothing appears to shew that William Standard Jones confirmed it. There is, indeed, a suggestion in the answers of Johnson and Gardner—in that of Johnson especially—that W. S. Jones confirmed it by the mortgage which he took from Johnson; but I do not recollect that the mortgage was read in evidence, or, at least, if it was, that it contained any allusion to the lease, so as to shew that the mortgage was granted subject to the lease. If it had been so granted, it would doubtless have been a confirmation of the lease; but, in the absence of evidence upon that point, I take it for granted that

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there is nothing contained in the mortgage which is binding in this respect on the interest of William Standard Jones.

Then how stands the case between the parties? At the moment I am called upon to make the decree, the case stands thus: that Story and William Standard Jones, and Johnson, are tenants in common each of an undivided third part of the George Inn, and certain cottages and nine acres of land, comprised in the lease to Johnson; that Edward Story and William Standard Jones, and Gardner, or they who represent Gardner, are tenants in common, in undivided thirds, of the remaining part of the estate; that Johnson is not only, under his title from Richard Jones, the owner in fee of one undivided third part of the George Inn and the nine acres of land, but that he is also tenant, for the remainder of the term unexpired, of another third part, namely, that which belonged to Edward Jones; the remaining third part belonging to William Standard Jones. It appears, therefore, upon this part of the case, that Johnson ought to account to Story or Edward Jones for one third part of the rent reserved by that lease since the time of Hall's death, and that he ought to account to William Standard Jones for one third part of the fair occupation rent, to be determined by the Master. That, I understand, the Master has determined; and I presume the parties would not wish that the decree should be altered in any of those parts, or that any further expense should be incurred with respect to them, which I do not propose to alter by my present decree. The same may be said, *mutatis mutandis*, of Gardner and his lease, because his was confirmed in the same manner.

Again, the mortgage which is proved to have been granted by William Standard Jones, must be considered as operating upon all his undivided third part in both parts of the estate; Johnson, therefore, would be entitled as mortgagee in possession as far as the house and the nine acres of

land are concerned, to retain that until the mortgage be satisfied, and he also would be entitled to have his mortgage secured upon the remainder of the share assigned to William Standard Jones. I think a provision is made in the decree of my Lord *Lyndhurst* for that purpose, because the parties are required to convey to the executors of the deceased Johnson the interest of William Standard Jones, for the purpose of satisfying that mortgage. That, of course, would remain as it stands, with the addition that a third part of the house conveyed to William Standard Jones, his separate share, must also be subject to the mortgage.

Then, the alterations that I propose to make in the decree are these: that a commission should issue, directed to two commissioners to be named by the parties, (I confine the number to two for the purpose of saving expense and securing impartiality, for we know very well that six may be as irregular in their verdict as two,) that the parties shall all agree in naming the commissioners, and in case they should not agree, then that it be referred to the Master to appoint two commissioners of his own authority, (for which I will state my reasons presently); that those commissioners shall be authorized and directed to make an equal partition of the George Inn, the cottages, and the nine acres of land comprised in the lease to Johnson, between the present defendant Johnson, Story, and William Standard Jones, subject (as to the one-third part conveyed to Story,) to the remainder of the lease still unexpired; that the same commissioners shall be directed and required to make an equal partition between Story, William Standard Jones, and the representatives of Gardner, of the remaining part of the estate, subject in like manner to the leasehold interest existing in one-third of those premises under the confirmation of Edward Jones; that the Master be directed to settle what shall be a fair occupation-rent for the George Inn and adjoining premises, and

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that one-third of that be accounted for to William Standard Jones ; that the Master, in like manner, settle what shall be a fair occupation-rent for the portion of the premises leased to Gardner, and that one-third of that be accounted for to William Standard Jones ; and lastly, that the portion awarded to William Standard Jones, of whatever it may consist, be subject to the mortgage which he is admitted to have made of it to the late Mr. Johnson, and be conveyed to the executors of Johnson, subject to that mortgage.

I will now advert to the reasons which have induced me to direct the commission to be issued to two persons, and with a reserve to the Master in case the parties disagree. I am very well aware that, according to the general practice, the parties are to choose their own commissioners. That practice may be very satisfactory, and, in ordinary cases, proper ; but it is merely a matter of practice for the purpose of facilitating the ends of justice. If it be found, in any particular case, that the parties will not name commissioners, or will not agree upon commissioners, or that the commissioners named will always take a partial view of the subject, I see nothing in principle to prevent the Court from ordering the Master, who is its general functionary, to appoint a commissioner, (as the Court itself might appoint a commissioner if it thought fit,) for the purpose of executing the objects of the decree. I do not require any precise case of the same description to be brought before me to justify me in making such an order. It appears to me, that if the parties can agree upon each individual commissioner, that would be the best tribunal. If they cannot do that, but are content to name one and one, that I have no objection to. Let the commissioners so chosen be inserted in the commission ; but if the parties cannot agree, let the Master appoint, of his own authority, two commissioners whom he may think proper persons to make the partition. With respect to the house and the nine

acres of land, I am fully aware of the difficulty of making a partition. If the estates were large enough, I should be very much disposed to do as was done by Lord *Macclesfield* in the case of *Lord Clarendon v. Hornby*, where he said he would advise the commissioners, the house being large and the estate large, to give the house to one, and a larger portion of the estate to the other, to prevent the inconvenience of making a division of the house. That seems a very obvious recommendation to any commissioners of common sense, and need hardly be made where the circumstances of the case permit it. If the circumstances do not permit it, or the parties will not agree to have the division effected by means of pecuniary compensation on the one hand or the other, as the case may be, the commissioners have nothing more to do than to divide the house in the best way they can. Upon that I can give no direction.

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UNDER the provisions of the 9 Geo. 4, c. 98, the undertakers of the navigation of the rivers Aire and Calder, are authorized, at their own costs, to make a navigable cut or canal from the river Calder, near a place called the Broad Reach, to another part of the river near a place called

July 3rd, 10th.

The undertakers of the Aire and Calder Navigation were empowered by act of Parliament to make a canal and a tram-road leading there-

from, and fifteen years were given to them to complete the works. At the expiration of nearly four years from the passing of the act, having completed part of the canal, and having marked out the tram-road, they gave notice, pursuant to the act, to the owners of a certain spot of land, of their intention to purchase it for the purposes of the tram-road. The land owners resisted the purchase, on the ground that the undertakers had deviated from the parliamentary line in the construction of their canal:—*Held*, that as the deviation worked no injury to the objectors, and as the undertakers did not admit any intention to abandon the original line, and there remained ten years in which they might complete their works, this objection was untenable.

Acts of Parliament for making canals, rail-roads, &c., are powers given by Parliament over the land of the different proprietors through whose estates the works are to proceed. Each proprietor, therefore, has a right to have the power strictly and literally carried into effect as regards his own lands, and also a right to require that no variation shall be made to his prejudice. But where the act of Parliament is faithfully carried into execution as regards his lands, he cannot, on the mere ground of a variation which is not injurious to himself, and which was made with the consent of others, obtain from a court of equity an injunction to stay the proceedings.

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Woodnook. They are likewise empowered by the same act to make an aqueduct, and to form various collateral branches in connexion with the cut or canal; also to make a railway or tram-road from the intended cut or canal near a place called Stanley Ferry, to communicate with a public highway leading from Leeds to Wakefield, near a place called Lofthouse Gate. By the 6th section, it is enacted, that the undertakers in making the intended cuts, canals, channels, branches, railways, or tram-road, shall not deviate more than one hundred yards from the course delineated on the map or plan authorized by the act. By subsequent sections, the undertakers are bound, within five years from the passing of the act, to agree for, or cause to be valued and paid for, the lands, tenements, and hereditaments required for the purposes of the works thereby authorized; and within fifteen years from the same period to complete and make navigable and passable all the works.

In pursuance of this act, the undertakers, within the five years limited for that purpose, effected purchases, or entered into contracts for the purchase of all the land required for the cut or canal, and they completed that part of the canal which was in the neighbourhood of Woodnook. Instead, however, of bringing the canal actually to Woodnook according to the course laid down in the map, they brought it through land which they had purchased for that purpose, to a spot lower down the river, near a place called Fairies' Hill. By this deviation, the canal was made to pass more than one hundred yards from the course marked out on the map.

The undertakers also, within the period prescribed by the act, purchased and paid for all the lands required for the railway or tram-road, except a piece of land numbered 147, which was the subject of this suit. They had also, at the period of instituting this suit, entered upon, staked, set out, and ascertained such parts of the land as they

thought necessary for the tram-road, according to the course described in the map or plan; but they had not actually made the tram-road in any part of the line, nor completed that part of the canal with which the tram-road was to communicate.

In December, 1832, the undertakers gave notice to the plaintiffs, who, as trustees of the Lake Lock Rail-road Company, were the owners of number 147, of their readiness to purchase that piece of ground for the purposes of the projected tram-road. Number 147 was the spot at which the projected tram-road would cross the Lake Lock rail-road. It was situate near Lofthouse Gate, and was entirely out of the way of the canal.

In consequence of this notice, an inquiry was had before a jury under the 20th section of the statute, for the purpose of awarding the amount of compensation and damages to be paid to the plaintiffs, and the jury awarded the sum of 6*l.* for compensation for the value of the land, and 2,800*l.* for future damages. The undertakers refused to pay the damages, but paid the compensation money into Court, and were proceeding to take possession of the piece of ground, when the plaintiffs filed their bill, and obtained an injunction against them.

The bill proceeded on the ground—first, that the plaintiffs had abandoned their intention of making the new cut according to the parliamentary line; secondly, that they had no right to work the cut and the tram-road contemporaneously, but were bound to complete the former in the first instance; and thirdly, that at all events, they had no right to take possession of the piece of ground in question, without paying or tendering to the plaintiffs the sum of 2,800*l.*, which had been assessed as future damages.

In Trinity Term, 1834, the defendants moved before Lord *Lyndhurst*, C. B., to dissolve the injunction, when his Lordship ordered a special case to be drawn up for

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the opinion of a court of law, and in the meantime the injunction to be continued. The case came on for argument on the plea side of this Court in Trinity Term last; when the Court, upon the second and third points above stated, gave judgment in favour of the defendants (a).

In consequence of this decision, the defendants now moved again to dissolve the injunction, and the only remaining question was, whether the motion could be resisted upon the first ground taken in the bill: namely, that the defendants had abandoned the intention of making the new cut according to the parliamentary line.

The defendants by their answer stated as follows:—that the canal so made from or near the point A., (the spot in the map where the deviation began), past D., and thenceforward to the river Calder, at the point H., near Fairies' Hill, has for the present been made in lieu of that portion of the proposed canal, which lies eastward of the point A.; but they say that they have not altogether or finally abandoned all intention of making, nor have they expressed their determination not to make the said canal in any line eastward of the said point, other than the said line from A. to D., and thenceforward to the point H., or to any other point; on the contrary, they say that the lands are actually purchased by the said undertakers for making the said last-mentioned portion of the proposed canal, which lies eastward of the point A., and whether they will or not abandon the same, or whether they will or not still persevere in making such last-mentioned portion of the canal, and abandon the portion which they for the present have made, is a matter entirely open for the consideration of the said undertakers. They say they believe that the said cut so made as aforesaid is not expressly within or described in the said act, or in the map

(a) See the case very fully reported in Meeson & Welsby's Reports, Vol. 2, p. 824.

or plan in the said bill mentioned, and therefore is not within the express enactments of the said act; and that it is for the present a substitution, and may, if it should be deemed advisable, be permanently a substitution for the line which is described in the said act, and the said map or plan.

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Mr. *Bacon* for the motion.

Mr. *Boteler* and Mr. *Hayter*, *contrà*.—The case comes back into this Court, for the purpose of trying the question as to the intention in the defendants to make the cut in the parliamentary line. The answer upon this point is vague and unsatisfactory, and affords strong grounds for presuming that the defendants have abandoned all intention of proceeding according to the act of Parliament. If that be so, it is clear that the Court will not take away the plaintiff's land. The probability that injury may result to the plaintiffs under such circumstances, is a sufficient ground for the interference of the Court, *Gibson v. Smith* (a): and the mere denial by the defendants of their intention to commit the injury is immaterial; *Jackson v. Cator* (b). If parties in the situation of the defendants choose to contract with the public by means of an act of Parliament, they are bound by the precise terms of the act, and cannot deviate from it in the slightest degree. That rule was laid down by Lord *Eldon* in the case of *Blakemore v. The Glamorganshire Canal Company* (c), and is applicable here. *Rex v. Cumberworth* (d), is also in point. Besides, if parties who have obtained an act of Parliament, on the faith that they have funds for a particular purpose, appropriate those funds to other purposes,

(a) 2 Atk. 182.

(b) 5 Ves. 688.

(c) 1 M. & K. 154, 162.

(d) 3 B. & Ad. 108; 1 Nev. & P. 197.

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there is reason to doubt whether they will have funds sufficient to execute the original purpose, and in that case the Court will interfere by injunction; *Agar v. Regent's Canal Company (a)*. In the present case, the terms of the act are very explicit, and ought to be rigidly adhered to.

Mr. Bacon, in reply, observed that in the case of *Blakemore v. The Glamorganshire Canal Company*, the time limited by the act for the completion of the works had expired, which was not the case here. He likewise contended that the answer of the defendants shewed no permanent intention of abandoning the parliamentary line.

In the course of the argument the Court asked the plaintiffs' counsel whether they were disposed to take an issue as to whether the deviation would be injurious to their clients; but they replied in the negative.

July 10th. ALDERSON, B.—In this case, the only question reserved for my opinion is, whether the injunction prayed by the bill ought to be continued.

When the case originally came on to be heard before Lord Lyndhurst, he reserved several questions for the opinion of the full Court on a special case. Those questions have been heard and decided; and the case now coming on for further directions has been argued before me.

The injunction was obtained on several grounds. One ground was, that the payment by the defendants of the whole compensation awarded by the jury, was a condition precedent to the taking possession of the piece of land belonging to the plaintiffs; and there can be no doubt that if any compensation had been warranted by the act of

(a) 1 Swanst. 250, cited.

Parliament, in respect of contingent injury, the Court would have been bound by the amount found by the jury, and would have continued the injunction until payment. But on that point the Court have already, after argument, given their judgment for the defendants. This ground for continuing the injunction therefore fails.

Another question was, whether the works could be allowed to go on contemporaneously, or whether the completion of the canal with which the railway was to communicate was a condition precedent to the taking possession of land for the purpose of making that railway. On this point, also, the defendants have already obtained the opinion of the Court in their favour.

The remaining question is, whether the injunction can be supported on the ground alleged by the bill, that the defendants have finally abandoned their intention of making the new cut in the parliamentary line. Now the facts are these. It appears that in one part of the line, not at all adjoining the land of which the possession is sought to be obtained, the defendants have made a cut deviating in some parts from the parliamentary line more than 100 yards. This cut is made through lands belonging to the defendants, and the plaintiff's counsel, on my enquiring, during the argument, whether they would wish to take an issue to try whether such deviation will in any way affect adversely their interests, have declined to accept such issue. I must take it, therefore, for granted that such deviation is of no prejudice whatever to the plaintiff. The answer also distinctly states, in reply to the interrogatories put by the bill, that this deviation has been made by the defendants *for the present*, but that they have not finally abandoned the intention of making the cut in the parliamentary line; that this question is still open for their consideration and adoption, and that they have actually bought, and are in possession, of the land necessary for the purpose of doing so. By the act they have fifteen years

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in the which to perform the whole works, although they are bound to get possession of the land for the purpose of the works within the first five years after the passing of the bill.

It is urged that the defendants do not, in their answer, say affirmatively that they do intend to complete the works in this part in the parliamentary line; and that their having made the other cut is decisive to shew what their ultimate intentions must be. But if their not answering affirmatively be relied on, it is a sufficient explanation of it, that they have never had the question so put to them as to require such an answer, and that the plaintiffs are in fault in that respect, for not having properly framed their interrogatories as to that point. And I am by no means prepared to say that the other circumstance (when I look to the positive oaths of the defendants) is to be taken as conclusive on the point of their having finally abandoned the parliamentary line.

I think, upon all these facts, that the injunction ought not to be continued; and my judgment proceeds on two grounds, which I will shortly state. I have had occasion before to consider the law on this subject, and I think it may be stated thus:—These acts of Parliament have been called parliamentary bargains made with each of the land owners. Perhaps, more correctly, they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed. Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and any one else. This I conceive to be the real view taken of the law by Lord Eldon in the case of *Blakemore v. The Glamorganshire Canal Company*, to which I was referred. In that case, that learned Judge says, “It may be of little

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consequence to A. B. whether the canal is brought to his lands through the land of C. D. or of E. F.; but if the Legislature has said it shall be brought through the lands of E. F., the Court of Chancery would enjoin them from bringing it through the lands of C. D." But this expression, I apprehend, means this: that only those lands of A. B. which the Legislature has given them authority to take, viz. those adjoining the lands of E. F., shall be taken. This is, therefore, but the first branch of the proposition which I have stated: that the power given by Parliament as regards the lands of A. B. shall be strictly and literally performed. But Lord *Eldon* went further in that case, and directed issues to be tried. Those issues afford a proof of the second branch of my proposition. They were, "whether the works done below and out of the plaintiff's land would injure Mr. Blakemore's works." But if the proposition contended for now had been true, that no variation at all could be allowed, this issue would have been wholly unnecessary. In Mr. Agar's case, which was mentioned at the bar, one point, it is said, was, that the Regent's Canal Company could not, for the sum which they had power to raise, complete their works; and if that were clearly made out, Lord *Eldon* says, in the case before referred to, that a court of equity would probably grant an injunction; and I fully accede to that proposition, in case the fact were clearly made out, and arose either out of circumstances occurring after the passing of the act, or from a failure to raise the sum contemplated by the act; for, to take any man's land, where the whole work can never be performed, is clearly injurious to him, and a substantial breach of the condition on which the Legislature granted the right to do it. So, again, if the *termini* were changed, and, instead of proceeding to some great town or city, the canal or railway were to terminate in some obscure village, the same result would follow. But I cannot accede to the proposition, that where the con-

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tract, as far as regards the land of the complaining land-owner, is exactly performed, any variation made at a distant point, and with the consent of the land-owner there, and producing no real injury to the complaining land-owner, ought to be the ground for an injunction, in a court of equity, to be granted at his application. That is the case here; and, on this ground, I should be prepared to discontinue the injunction.

But in this case, there is another ground, also, on which I may proceed. At all events, it must be clearly made out that there is a final abandonment of the parliamentary line. The defendants are required to obtain the land within five years, and to complete the works in fifteen. There are, therefore, ten years, during which they have a right to deliberate, and even to change any resolution they may have taken. How can the Court properly continue an injunction against them, to prevent their getting possession of this land, when, for aught we can tell, they may strictly and accurately follow the parliamentary line after all? The plaintiff must therefore shew that the defendants have not merely deviated for the present, but that they have finally abandoned the parliamentary line. This they have failed to do.

On this ground, also, the defendants are entitled to the judgment of the Court.

Injunction dissolved.

Nov. 10th.

Where lands had been purchased under a decree in a creditors' suit, the Court, on the application of a creditor who had for four years acquiesced in the purchase, and who was not supported in his objections by the other creditors, refused to set aside the purchase, on the ground of misdescription of the land in the particulars of sale.

Misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale.

Quære, whether any party, except the plaintiff, in a creditors' suit, can apply to open the bidding, or to set aside a sale made by order of the Court in that suit.

Payment to the solicitor for all parties in the suit, is equivalent to payment into Court.

PRICE, v. NORTH.

THE bill was originally filed by Roderick Price (since deceased) and David Jenkins, on behalf of themselves and

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all other the creditors of the testator, Roderick Gwynne, for the administration of Gwynne's assets. The petitioner, William Meyrick, a solicitor, was reported a specialty creditor of the testator.

In pursuance of an order made in May, 1829, certain of the real estates of the testator were put up for sale by public auction in July, 1831, in 57 lots, one of which, lot 50, was described in the particulars of sale as follows:—"Seven fields, 14 acres more or less, part of Godrewed farm; tenant, John Hughes; yearly rent, 42*l.*; tenancy from year to year." The 8th condition of sale was to the effect, that if there should appear any mistake or error in the description of the premises in the particulars of sale, or any other mistake or error respecting the premises, the same should not annul the sale, but should be the subject of compensation.

It appeared that lot 50 was not sold at the auction, but was, in November, 1831, purchased, by private contract, by Mr. Henry Jones, for the sum of 973*l.* By the terms of that contract, the purchase was to be made according to the conditions of sale at the auction. By an order dated the 21st of May, 1832, this purchase was confirmed, and it was declared that Jones should be at liberty, on or before the 12th of June then next, to pay his purchase money into court, and might thereupon be let into possession of the premises.

The petition alleged that Henry Jones had not paid his purchase money into court, or taken a conveyance of lot 50, and yet that he had entered into possession of those premises, and received the rents and profits thereof; and moreover, that the seven fields comprised in lot 50 were incorrectly described in the particulars of sale, inasmuch as the admeasurement thereof was stated to be 14 acres, whilst, in fact, the same consisted of 27 acres, or thereabouts; that the rent of 42*l.*, mentioned in the particulars, was much less than the annual value, the purchaser having

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since let the premises for 80% ; and that, under these circumstances, the premises had been sold for a sum greatly under their actual value, which was, as the petitioner believed, about 1,600%. The petition prayed a reference to the Master, to ascertain the proper amount of compensation in respect of the misdescription, and that the same, and also the original purchase money, with interest on the whole, according to the conditions of sale, might be paid by Jones, or that the order of the 21st of May, 1832, might be discharged, and the lot resold.

It appeared from the evidence given on behalf of the petitioner, that if the acres mentioned in the particulars of sale were to be taken as statute acres, there was clearly a misdescription; and although the parties opposing the petition gave evidence that, at the time of the sale, there was a verbal statement that the admeasurement was by customary acres, yet it did not appear that such statement was made by any authorized agent on the part of the vendors. With respect to the allegation as to the non-payment of the purchase money, it appeared that Jones had paid the money, within the time limited, to the solicitor who acted for all parties in the suit, but that the solicitor had delayed the payment of the money into court.

The petitioner had presented a former petition on this subject in February, 1837, which was disapproved by the other creditors. No reason, however, was given for his not having sooner taken steps in the matter; and in order to shew that he must have had early information of the misdescription, the opposing parties proved that he acted as the attorney of Mr. Crawshay, the purchaser of other lots, whose purchase was confirmed in December, 1836.

Mr. *Simpkinson* and Mr. *Booth*, for the petition.—The word “acres” in the particulars of sale, must, *prima facie*, be taken to mean statute acres. There is nothing in the particulars or conditions of sale which, either directly or

indirectly, leads to a contrary supposition. All that can be said on the other side is, that there was a verbal explanation at the sale that these were customary acres; but that is not the way in which a sale ought to be conducted under the order of this Court, and the creditors are not bound by it. The only question is, whether this application is made in due time. As to that, it is clear that we come to the Court before the purchase has been completed. No doubt, a sum of money was paid by the purchaser to his solicitor, but it was not paid into court till after this petition was presented. *Non constat* that the sum so paid to the solicitor was this purchase money; but even if it was, it is not a payment into court, and the purchaser is not entitled to any indulgence. If it be said that this application cannot be made by a creditor, *Tanner v. Radford* (a) is an authority to the contrary. In that case an order was made at the instance of a creditor, that the purchaser should be discharged from his purchase, and that the report confirming the purchase should be set aside, and that the Master should proceed to a resale.

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Mr. W. M. James, for the purchaser.—This application comes too late. The purchase in question was confirmed in May, 1832; and after the confirmation of the Master's report of a purchase, the Court will not open the biddings: *Morice v. Bishop of Durham* (b), *White v. Wilson* (c). No fraud was committed in this transaction. When the other lots were sold, a positive statement was made as to the extent of the property, and that statement was known to the vendors' solicitor. [The Lord Chief Baron.—The party making the declaration at the sale was not the auctioneer, or the avowed agent of the vendors.] At all events, the petitioner gives no reason for his delay. It is

(a) Not reported on this point. See 6 Sim. 21.

(b) 11 Ves. 57.

(c) 14 Ves. 151.

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obvious, from his dealings with Mr. Crawshay, that he must have been acquainted with the misdescription of the property so far back as 1833. Why, then, does he lie by till the year 1837? If a person enters into a contract for purchase under a decree, and, six years afterwards, is compelled to relinquish it on grounds of value alone, no person will purchase except at such a price as will indemnify him against such a litigation as this. Besides, the petitioner has no right to make this application. A creditor in his situation has no *locus standi* in this Court till he has taken the case out of the hands of the plaintiff's solicitor. The special circumstances of the case, which has been cited to shew the contrary, do not appear.

Mr. *Sutton Sharpe*, for the plaintiff.—The creditors for whom this suit is instituted have proved their debts to the amount of 15,000*l.*, the petitioner's debt being about 358*l.* The petitioner acts as his own solicitor, and, if he succeeds in this application, will be a gainer to a considerable amount; while, on the other hand, he can only lose a small sum. He is, therefore, not in the ordinary situation of a creditor making an application of this nature. This purchase was not questioned by any of the other creditors. The statement at the auction was made by the party who was employed to fix the reserved bidding. He was a creditor upon the estate, and must have been known to the other parties. He makes a statement that these acres were really customary. The lot is put up, and the price offered does not reach the reserved bidding, which is 1,150*l.* The price subsequently given by the purchaser was considered fair at a meeting of the creditors, of which the petitioner had notice. Why, then, has he delayed his objections to the present time? Besides, a creditor cannot present such a petition as this. If a creditor allows another person, as plaintiff, to conduct the suit, he must abide by it; otherwise, no one would deal with a plaintiff in a creditors' suit.

In *Tanner v. Radford*, the purchase was made by a person who was solicitor for the plaintiff, and who was alleged to have purchased for the benefit of the plaintiff. The application was not against a third person, but against the plaintiff himself. A creditor may apply, as against the plaintiff, to take the case out of his hands, or to prevent his having a particular benefit, but not against a third person. If a third person deals with my attorney, I cannot apply against him; I must proceed against my attorney. A stranger, who deals with the plaintiff in a creditors' suit, is fully justified in the act, and cannot be prejudiced by the conduct of the plaintiff in his character of trustee for the other creditors. The case cited proves no more than that every creditor has a right to attack the conduct of the plaintiff.

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Mr. *Simpkinson*, in reply.—The argument on the other side proceeds on the supposition that the object of the petition is to rescind and resell; but that is only an alternative which is offered to the purchaser for his own benefit. The object of the petition is to carry into effect the true spirit and meaning of the contract. The petitioner makes no accusation of fraud, but calls upon the purchaser to perform his contract really and substantially. The objections which have been urged on the ground of delay are immaterial, because the petition, so far from impeaching the sale, proceeds on the validity of the sale. It is said that the plaintiff in a creditors' suit is the agent of all the creditors; but that is not true to the extent contended for. A creditor is not bound hand and foot by the plaintiff, nor does he delegate any authority to the plaintiff. Besides, this is not the sale of the plaintiff, but of the Court.

The LORD CHIEF BARON.—If I were called upon to dispose of this petition upon the question, whether or not

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Mr. Meyrick has a *locus standi* in this Court, I should desire further time for consideration before I gave my judgment; but, under the circumstances of this case, I think it unnecessary for me to give any opinion upon that point.

It is said that, upon the facts as proved on behalf of the petitioner, this sale ought either to be set aside altogether, or modified by a reference to the Master, directing him to ascertain what addition ought to be made to the price agreed to be given by the purchaser, by reason of the misdescription of the premises, and according to the conditions of sale which he entered into. I know that courts of equity have gone a great way in allowing contracts of this nature to be altered on the ground of misdescription, but I own it appears to me that such a misdescription as this would not be ground for modifying the contract, but for avoiding the sale altogether. Assuming, however, that this case comes within the limits within which courts of equity have proceeded in modifying contracts such as these, must there not be also some limit as to the time in which they will act? Without resorting to the principles of law laid down by Lord *Eldon*, (to which, however, I fully accede), if I allow this party to open the biddings four years after he has become acquainted with the facts on which he founds this application, why may I not allow him to do the same after twenty years? The ground on which I dismiss this petition is, that Mr. Meyrick, assuming that he would have a right to present his petition if he had presented it within a reasonable time, has not made it appear to the Court that he was not apprised of these facts in 1833. It appears that at that time he not only had as a creditor an interest in seeing every thing properly and legally done, but that, as the solicitor of Mr. Crawshay, he had in his own office the means of ascertaining the extent of the estate; for he says that in 1833, in negotiating for Mr. Crawshay, he became acquainted with the value of the

estate, and how he could be acquainted with the value without being acquainted with the extent, I am at a loss to know. I must, therefore, assume that at that time Mr. Meyrick knew the extent of this property; and then the question is, whether, in opposition to all the other creditors who repudiate such a proceeding, he ought to come forward in the year 1837 and petition to have this matter go back to the Master. It appears to me that there are two sufficient reasons for not acceding to such an application. One is, that the purchaser, upon the faith that he has obtained the benefit of this contract, may have laid out large sums of money on the premises, and to say that in four years afterwards the Court might alter his interest in the property, would be to say that the Court might do it after any indefinite time. The other is, that as I have the interests of the other creditors to take care of, I ought not to refer the matter back to the Master, if the probability is that he would have great difficulty in ascertaining the actual value of the property at that time. Now, it appears to me, considering how much the value of land varies in the course of time and with reference to its situation, that the Master could not arrive at any result on this subject without great difficulty; and, therefore, I think that the possible expense of such an enquiry in his office, is, alone, a sufficient answer to this application.

As to the purchaser, I think, he ought to be taken to have done his duty. Vaughan was his solicitor and that of the other creditors. If it was his duty to pay the purchase-money into Court, what could he do more than pay it to the person who was acting as solicitor for all parties? If he had paid it to his own solicitor, who was not the solicitor of the other parties, this observation would not apply; but, paying it in the manner he does is equivalent, as far as he is concerned, to paying it into Court. It was Vaughan's business to pay it into Court when he received it.

Petition dismissed, with costs.

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Nov. 11th.

The conduct of a creditors' suit taken out of the hands of the plaintiff, on the ground of delay and mismanagement in regard to the sales of real estates, delay in the payment of money into Court, and the appropriation by the plaintiff's solicitor of rents and profits of the estates in discharge of his costs.

A petition was now presented by Meyrick, praying that the conduct of the cause might be taken from the plaintiff Jenkins, and might be given to the petitioner.

The petition, supported by affidavit, stated the original decree, dated 10th July, 1810, directing the usual accounts of the personalty and enquiries as to the testator's real estates; that by his report, dated 30th April, 1812, the Deputy Remembrancer stated the amount of debts and credits, and amongst other credits, a balance of 269*l.* due from T. H. Gwynne, and found that the testator was, at the time of his death, the owner in fee of certain real estates, some in possession, and others in reversion expectant on the life estate of T. H. Gwynne; that by the decree made on further directions, dated the 4th May, 1812, T. H. Gwynne was ordered to pay his balance into Court on or before the 4th February ensuing, and the deputy Remembrancer was to proceed to a sale of the testator's real estates; that no steps were thereupon taken by the plaintiffs for effecting a sale of the real estates of which the testator was seized in fee at the time of his death, or for securing the rents and profits for the benefit of the creditors; that T. H. Gwynne never paid the balance due from him into Court, and no steps were taken by the plaintiff to enforce the order for that purpose; that T. H. Gwynne died in 1826, but that no steps were thereupon taken by the plaintiff for selling the real estates or securing the rents for the benefit of the creditors; that by an order of the 21st May, 1829, it was referred to the Master to approve of a scheme for a sale of the estates in lots, and that the Master accordingly caused the estates to be put up for sale by auction in lots on the 20th July, 1831, when several of the lots were sold; that lot 50 was not sold at the auction but purchased by private contract by Henry Jones, who, by an order of May, 1832, was ordered to pay his purchase money into Court on the 12th June then ensuing; that Henry Jones purchased this lot at an undervalue by reason of the plaintiffs having

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misdescribed the premises (a), and that his purchase-money was not paid into Court until the 17th June last ; that Philip Vaughan, of Brecon, had, throughout the proceedings, acted as the solicitor for all parties interested in the suit, and had had the sole management thereof, and of the sales which had been made under it ; and that he had also been employed by Henry Jones in the matter of his purchase, and had been instructed to prepare the conveyance ; that upon the sale of the estates in 1831, several persons had purchased lots, but had paid their purchase money or had taken possession at times inconsistent with the order, and that one of them, William Crawshay, had paid only part of his purchase money into Court ; and, lastly, that the plaintiff or his solicitor, Vaughan, was in the receipt of the rents of the several estates from the respective deaths of the testator and T. H. Gwynne, until the purchasers were let into possession, but that no accounts of the rents was ever rendered, nor had they been brought into Court in the cause.

Mr. Vaughan, by his affidavit, stated in substance, that the delay of the sale was occasioned, in the first instance, by the infancy of one of the parties who was entitled in reversion under the will of the testator ; that the estates afterwards became depreciated ; and that, in 1831, five of the creditors were appointed to conduct the sale, under whose directions he acted ; that various lots were then sold, of which one lot was sold to Mr. Crawshay ; that Crawshay had refused to pay his purchase money, and had raised various points of law which had delayed the proceedings, and that the petitioner Meyrick acted as his solicitor ; that he, Vaughan, had not been concerned as solicitor in the cause throughout all the proceedings, nor at any time was he concerned for all parties in the suit ; those who represented the real estates appearing by sepa-

(a) See ante, p. 621, 622.

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rate solicitors. He admitted that he had received, to his own use, the rents of the real estates, but he stated that he had taken them in discharge of his costs, which they were not sufficient to satisfy, and that he was ready to account for them.

It appeared, that under the will of the testator, the estates were vested in his daughter, Anna Maria Holford, for life, with remainder to her son James P. G. Holford, and other of her sons, in tail ; and that in 1828, when the sons were of age, a proposition was made by Mrs. Holford to the creditors, with a view of bringing the suit to an end, but that that proposition was declined. This, and some other circumstances, are noticed more particularly in the arguments and judgment.

Mr. *Simpkinson* and Mr. *Booth*, for the petition.—In suits instituted by creditors, the Court will not allow the same solicitor to act for all parties. The same solicitor cannot act for the creditors and also for parties who are accountable to the estate : *Spode v. Smith* (a). Independently of that circumstance, the interests of the creditors in this case have been grossly neglected. An order which had been made in 1812 for the payment into Court of a balance due from T. H. Gwynne, was never enforced, although Gwynne lived till 1826. It is immaterial, in that view of the case, whether Vaughan was the plaintiff's solicitor at that time or not, for the conduct of the plaintiff was equally blameable. But, according to Vaughan's own statement, he seems to have begun acting for the plaintiff in 1820 ; therefore, from 1820 to 1826, there was culpable neglect in not enforcing that payment, and loss of interest to the creditors. Then there was a manifest neglect in the conduct of the sales. After your Lordship's decision upon the former petition, we shall say nothing

(a) 3 Russ. 511.

upon the sale of lot 50 as affecting the purchaser; but we are entitled to say that that sale was grossly mismanaged by the persons who conducted it. Besides, it is not disputed that although the purchase money for that lot was paid by Jones to Vaughan in January, 1832, it was not paid into Court by Vaughan till June, 1837; and yet, in the meantime, Jones was let into possession by an order of the Court. No reasonable cause whatever is assigned for the delay in winding up these proceedings. Whatever the objections of Mr. Crawshay were to the title of the premises which he purchased, it was the plaintiff's duty to make him pay his purchase money into Court.

The remaining ground of this application is the receipt of the rents and profits by Vaughan, without accounting for them. It now appears, for the first time, that they have been paid in part discharge of his costs, but he had no lien upon them for his costs. [*The Lord Chief Baron*.—One does not see how he could receive the rents, except for the reversioners.] And if he received for the reversioners, he acted for all parties. It is scarcely necessary to cite cases in support of this application, but *Powell v. Walkworth* (a), and *Fleming v. Prior* (b), are in point.

Mr. Sutton Sharpe for the plaintiff.—When it is said that a solicitor acts for all parties in a creditors' suit, the meaning is, that he is the solicitor both of the creditor and the debtor. That was not the case here. This suit was instituted for the purpose of charging these real estates with Roderick Gwynne's debts. The parties representing the real estates have always contested the matter, and appeared by separate solicitors. The conduct of the petitioner is disingenuous; for he was acquainted with all the facts connected with the suit from the beginning. The

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(a) 2 Madd. 183.

(b) 5 Madd. 423.

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suit was not in fact conducted solely by the plaintiff, but by committees of creditors who held various meetings during the progress of it. The petitioner was himself present at several of these meetings, particularly at the meeting in 1828, when Mrs. Holford's proposition was considered. It is clear, therefore, that the plaintiff did not act for himself only, as is usual in creditors' suits, but for the body of the creditors; and the petitioner knew that fact. The delay of the sale originally arose from the minority of the reversioners, for at that time the parol could demur. When the infants came of age, Mrs. Holford made a proposition for a settlement with the creditors; but that proposition being rejected, principally through the means of the petitioner, a further delay took place. After that period there was a depreciation in the property, but in 1831 part of it was sold. The payment of Jones's purchase-money into Court was delayed by reason of the petitioner's notice to Vaughan that he intended to dispute the validity of that purchase. Besides the lots so purchased originally formed part of the same farm with the lots purchased by Crawshay, of which the title is objected to. With respect to the receipt of the rents, it is submitted that Vaughan's conduct, under the circumstances, was completely justifiable.

Mr. *Simpkinson*, in reply.—There is no proof of any acquiescence on the part of the petitioner in the misconduct of the plaintiff, more especially as it appears that, in 1832, Meyrick requested Vaughan to apply for a receiver, which Vaughan omitted to do, without assigning any reason for his omission, or mentioning the proposition to the other creditors. With respect to the delay, it seems proper to advert to the practice of the Court of Chancery in cases of this nature. That practice, which is regulated by *Ord. 56*, 3rd April, 1828, might be adopted with advantage in this Court.

The LORD CHIEF BARON.—My decision upon the last petition has no necessary or natural connexion with this. I thought it unnecessary to grant the prayer of that petition, because it was presented by a creditor after a lapse of four years from the time he first became acquainted with the circumstance of which he complained, against a *bond fide* purchaser, who had paid his purchase money into Court as shortly as he could.

This is a petition presented by a creditor in a creditors' suit, complaining of such miscarriage on the part of the plaintiff and his solicitor, as requires, in his judgment, a change in the mode of conducting the suit. I consider that where a bill is filed by a creditor for the common benefit of all the creditors, the matter is placed entirely in the hands of the Court, and that all parties before the Court are equally bound by the order of the Court; and that in case of misconduct in any of the parties whose duty it is to carry a decree into execution, the Court will administer a remedy in the same manner as where one of its own officers is guilty of misconduct in the execution of its decrees. In a suit so constituted, the interest of the general body of the creditors is administered by the Court, and the Court must see that interest duly consulted. Has it been duly consulted in this case? It appears to me to be by far the most probable conclusion to be drawn from the circumstances which have been proved, that it has not been duly consulted.

In 1828, when the tenant for life of these estates died, and the persons entitled in reversion were of age, a question was entertained, whether or not a proposition which had been made by those persons and their mother, Mrs. Holford, with a view of bringing the suit to a conclusion, should be acceded to. A meeting took place, and the offer made by Mrs. Holford was to pay all the debts up to the year 1812, with interest. At that meeting, Meyrick and other creditors attended, and objected to that settle-

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ment. They must have objected to it on the ground that the decree would produce a larger fund for them than what this lady offered them. They must have thought it better to go in and obtain payment of their debts under an order of the Court, than under that compromise. Yet it appears that these proceedings have gone on to the year 1837, and that the estate has not been administered, nor the creditors paid. I am not satisfied that the delay has been duly accounted for which took place between the year 1828, when the creditors met, and the year 1831, when, for the first time, a sale was made of part of the estates.

Then, with respect to the sale of lot 50 by private contract, in December, 1831. That lot was sold to Henry Jones for 973*l*. Jones paid his purchase-money to the gentleman representing the plaintiff, in January, 1832, and he was accordingly let into possession. In March following, an application was made by the party conducting the suit, for an order on the purchaser to pay his purchase-money into Court, and the order was accordingly made. It does not appear that any creditor knew that the money was not in Court, and bearing interest for the general benefit; but it appears that from January, 1832, to June, 1837, five years and a half, the money remained in the hands of the plaintiff and his solicitor, and was not accounted for; and it is left to the ingenuity of counsel to surmise that objections to the title stood in the way of payment of this money into Court, which had been actually paid to the solicitor. Though it is in his hands all the time—though it is in the hands of the individual conducting the suit for the benefit of the creditors, it is not applied for their benefit but his own. Therefore, considering him merely as an agent of the Court, conducting a suit for the benefit of the suitors, I cannot say that the delay in this instance is one which can be tolerated by the Court. It is a delay of such a nature as might, under some circumstances, prove very serious to the

purchaser. What would have been the case if the money had been paid to an officer of the Court and he had retained it? The result would have been that the Court would have dismissed that officer; or at all events would have charged him with 5% per cent. interest.

Again, it appears that when the estate was not sold in 1828, a suggestion was made by Meyrick to Vaughan relative to the appointment of a receiver. That might have been a proper suggestion if the rents were adequate for that purpose, and, on the other hand, it might have been proper to refuse it; but it is not disputed that Meyrick's proposition was made with a view of being taken into consideration by the creditors generally. Yet it is charged against Vaughan that he did not inform the creditors of this proposition; but that, on the contrary, he kept possession of the premises, and took to his own use the rents and profits which ought to have been placed in the general fund, and the answer which he gives on this subject is, that he took those rents in discharge of his costs. But the Court ought to have been allowed to say, whether or not they should have been so appropriated, the order being that the estate should be sold and the money paid into Court. It was an oversight, to say the least of it, not to state to the creditors how the rents were applied.

There are other circumstances, though perhaps not so strong or specific as those which I have mentioned, which bring me to the conclusion, that the conduct of the suit ought to be taken out of the hands of the present plaintiff. Then the question is, whether it ought to be placed in the hands of Meyrick. It seems to me that a distinction must be made in regard to his character as a creditor, and as the solicitor of one of the parties, who is accountable to the estate. As a creditor no objection would be made to him by the Court or the creditors; but, as the solicitor of Crawshay, who is one of the remaining accounting par-

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ties, I think it is not desirable that he should have the conduct of the suit. I shall, therefore, refer it to the Master to appoint a creditor for that purpose.

Order accordingly.

Ex parte PAYNE—In the Matter of the GREAT WESTERN
RAILWAY ACT.

Nov. 11th.

Words of recommendation
in a will held
not to amount
to a trust.

THE company, having purchased lands of the petitioner, had paid the purchase money into Court, under a clause of their act of Parliament, which authorizes that mode of proceeding in the case of a purchase from infants, tenants for life, and other persons under legal disabilities. The company conceived that the words of the will under which the petitioner was entitled to the property in question, left it doubtful whether she took an estate for life only, or in fee. The petitioner having presented her petition to have the money paid out of Court to her absolute use, the question now came on for the decision of the Court.

The words of the will (the testator having in the first instance devised the property absolutely to the petitioner, his daughter, in fee) were as follows:—"And I do hereby declare that the estate and property hereinbefore devised and bequeathed by me to my said dear daughter, is intended as some reward for her affectionate, unwearied, and unexampled attention to me during my illness for many years, and is kept separate from the other interests she will take under this my will, as a memorial and testimony thereof. And I direct my said daughter to keep the buildings, gardens, and premises in good repair, order, and condition; and in case she should happen to marry, I strongly recommend her to execute a settlement of the said estate, and thereby to vest the same in trustees, to be

chosen and approved of by her, for the use and benefit of herself and her assigns for her life ; with remainder to her husband and his assigns for his life ; with remainder to all and every the children she may happen to have, if more than one, share and share alike ; and if but one, the whole to such one, or to such other uses as my said daughter shall think proper, to the intent that the said estate, in the event of her marriage, may be effectually protected and secured."

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It appeared that the petitioner was fifty-eight years of age.

Mr. *Monro*, for the petitioner, observed that under this will she took absolutely, and that there could be no trust, because neither the persons to whom the estates were limited, nor the estates themselves, were certain. It was true the petitioner might marry, and have children, but until those events occurred the parties to take were uncertain ; and even then the estates were uncertain, for they were limited to her husband and children, or to such other uses as she should think proper.

Mr. *Stevens*, for the company, did not oppose the petition.

The LORD CHIEF BARON was of opinion that the petitioner had a right to convey the property absolutely, and therefore made the order as prayed.

See *Lechmere v. Lavie*, 2 M. & K. 197.

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Nov. 11th.

A partner, resident in England, of a house carrying on business abroad, is not bound to set forth a schedule of books, &c., relating to and in the custody of the foreign house.

MARTINEAU v. COX.

THIS was a bill seeking to charge the defendant, as a partner in a house carrying on business as merchants and factors in Portugal, with the value of certain bombazeens, which the plaintiff had, through the medium of the defendant, consigned to the Portugal house for sale. The defendant resided in London, where he carried on business as a merchant on his own separate account, and had had, in that character, various dealings with the plaintiff. Amongst other things, the bill charged that there were in the possession or custody of the house in Portugal various books of account, papers, writings, and memorandums, whereby the partnership between the defendant and that house would appear, and whereby certain dealings mentioned in the bill would appear to have been carried on between the plaintiffs and the defendant on the partnership account. To the inquiries founded on this charge, the defendant answered, that he could only set forth such books, &c. as concerned his separate dealings with the plaintiff, and such as related to consignments which he had made for them to the Portuguese firm; but that he knew nothing of the books, accounts, and transactions of the Portuguese house as a partnership. He admitted that, to a certain extent, he was a partner in the Portuguese house. An exception having been taken to the defendant's answer for insufficiency,

Mr. *Rogers* appeared in support of the exception.—Although the defendant may have no personal knowledge of the matters inquired after, he has the means of knowledge, and it does not appear that he has taken all the steps he might have taken to get the information required. In *Neate v. Duke of Marlborough* (a), it is laid down, that

(a) *Ante*, p. 3.

if a bill state a fact not denied by the answer, by which it appears that the defendant has the means of making the inquiry, he must answer as to the result of his inquiry. Here, the defendant has the means of inquiry. The books in question are in the possession of the Portuguese house; and the possession of one partner being the possession of the other, he ought to set forth a schedule of these books.

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THE LORD CHIEF BARON.—The case which has been cited has no application to the present. Situated as the defendant is, I do not think he is bound to write to his partner for these books. His partners are in another country, and he has no control over their dealings and transactions. A man is not bound to know the affairs of a partnership in Portugal or in India, in which he may happen to have a share. He is bound *by* their transactions, it is true, but he is not bound to know them. Suppose the defendant gave a schedule of these books, and the partners abroad refused to give them up; how could this Court enforce their production? The Court is not bound to commence the exercise of a jurisdiction which it cannot ultimately enforce. I cannot make an order on a gentleman in Portugal.

Exception overruled.

See *Farquharson v. Balfour*, Turn. & Russ. 190.

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ARTHUR BOWEN, PEREGRINE BOWEN,
and LUCY BOWEN, Spinster,
and

} Plaintiffs,

JAMES SCOWCROFT, the elder, CHARLES
BOWEN ALLEN, JOHN ARTHUR ALLEN,
PEREGRINE SHAW ALLEN, THOMAS
SCOWCROFT, WILLIAM BOWEN SCOW-
CROFT, MARTHA ELIZABETH SCOW-
CROFT, HUGH ARTHUR FENDER SCOW-
CROFT, RICHARD MATHIAS, THOMAS
GWYNNE, and JAMES SCOWCROFT, the
younger, - - - - -

} Defendants.

July 7th.
Dec. 1st.

Devise to the testator's two brothers, Arthur (who was his heir-at-law) and Peregrine, one-third part each, share and share alike, of testator's lands and premises at A., subject to the life interest therein of the testator's father, the other remaining third part of the said lands and premises to the testator's sisters, Mary and Lucy, share and share alike, making a sixth part to each, of the said lands and premises, and in case of their demise, he willed, bequeathed, and devised their respective shares to be equally divided among their children, or their lawful heirs, observing first, that his (the testator's) father was entitled to raise the sum of 2,000*l.*, by mortgage or otherwise, according to a bond executed to him by the testator:—*Held*, first, that the words "in case of their demise," applied to the devise to the two sisters only, and had no reference to the previous devise. Secondly, that the devise to Peregrine, the younger brother, was for life only; and, thirdly, that the two sisters took estates for life only in the shares devised to them, with remainder to their children, as tenants in common in fee.

WILLIAM BOWEN the younger, by his will, dated the 4th November, 1810, duly executed and attested to pass real estate, devised as follows:—

"In the name of God, Amen, I, William Bowen, jun., Captain in his Majesty's 59th regiment of Infantry, &c. &c. &c., do declare this to be my last will and testament. I will and bequeath to my two brothers, Arthur and Peregrine Bowen, Esquires, one-third part each, share and share alike, of the lands and premises in Prendergast and Ambleston, county of Pembroke, in which my father William Bowen, sen., Esquire, has a life interest, according to a bequest or deed executed by his late uncle Francis Bowen, Esquire, deceased, (my grand-uncle), and settled by him on me in remainder, after the decease of my much respected father, said William Bowen, sen., Esquire, who, I sincerely hope, may enjoy it for many, many years to

the

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come; the other remaining third of those said above-mentioned lands and premises, in Prendergast and Ambleston, I will and bequeath to my dear sisters, Mary Allen and Lucy Bowen, share and share alike, making a sixth part to each, of the before mentioned lands and premises; and, in case of their demise, I will and bequeath and devise their respective shares or proportions to be equally divided amongst their children or their lawful heirs, observing—first, that my dear father, William Bowen, sen., Esq., is entitled to raise the sum of 2,000*l.* sterling, by mortgage or otherwise, according to a bond or deed executed by me to him on the 15th April, 1802, for that purpose. I also will and bequeath to my dear father 10*l.* sterling, to purchase a mourning ring, or any other token of remembrance. I further will and bequeath to Mary Bradshaw, of Newark, five hundred star pagodas, or two hundred pounds sterling, which I lately deposited with Messrs. Harrington & Co., agents at Madras, who are hereby authorized and directed to pay the same into the hands of my executors, to be remitted by them to the said Mary Bradshaw. I also will and bequeath to my brother, Peregrine Bowen, all the personal property I may die possessed of, as well as any prize money I may hereafter become entitled to, by the capture of the Isle of France and its dependencies, requesting my dear brother to purchase out of it a gold watch, of the value of twenty-five guineas, to be presented as a gift of true esteem to my kind friend Henry Rees, Esq., attorney-at-law. I do hereby constitute and appoint Lieutenant Richard Lenton and Paymaster Hickman Rose, of his Majesty's 59th regiment, to be my lawful executors to this my last will and testament."

The testator, at the time of making his will, and thenceforward down to the time of his death, was seised or entitled to the reversion or remainder in fee simple expectant on the death of his father William Bowen, the elder, (and

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subject to two terms of 900 years and 1,000 years, vested in trustees for raising and paying to the said William Bowen the elder, his executors or administrators, under one of the said terms, a sum of 2,000*l.*, and for raising and paying, under the other of the said terms, a like sum of 2,000*l.* to the said William Bowen the younger, his executors and administrators,) of and in divers hereditaments situate in the parishes of Prendergast and Ambleston, in the county of Pembroke.

The testator died shortly after the date and execution of his will, without having ever been married, and without having revoked or altered his will with respect to his real estate, leaving the plaintiff Arthur Bowen, his elder brother and heir-at-law, and the plaintiff Peregrine Bowen, his only other brother, and two sisters, the plaintiff Lucy Bowen and Mary Allen, then a widow, and since deceased.

William Bowen, the elder, died some time after the testator, and Mary Allen, after the date and execution of the testator's will, intermarried with the defendant James Scowcroft the elder, and afterwards died, leaving eight children surviving her, namely, the defendants Charles Bowen Allen, her eldest son and heir-at-law, and the defendants John Arthur Allen, and Peregrine Shaw Allen, her children by her first husband John Allen, deceased; and the defendants Thomas Scowcroft, James Scowcroft, the younger, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, her children by her second husband, the defendant James Scowcroft the elder.

After the death of the testator, but during the lifetime of his father, the tenant for life, the defendant James Scowcroft the elder, and Mary his wife, levied a fine *sur conusance de droit tantum* of the one-sixth part or share of Mary Scowcroft in the estates devised by the will of

the testator. No uses were, at that time, declared of the fine. The tenant for life died shortly after the levying of this fine; and upon his death, the defendant, James Scowcroft, the elder, and Mary his wife, entered into the receipt of the rents and profits of the one-sixth share of the estates devised by the testator's will, and they continued in such receipt.

Mrs. Scowcroft died suddenly in consequence of an accident, having, immediately prior to her decease, executed a short deed, declaring the uses of the fine levied by her to be to her husband, the defendant, James Scowcroft, and her brother, the plaintiff, Peregrine Browne, in fee. The intention of the parties, however, was, though not expressed by any deed, that Mrs. Scowcroft's share should be sold, and the proceeds applied for the benefit of her children.

The bill was filed by Arthur Bowen, Peregrine Bowen, and Lucy Bowen, against the husband and children of Mrs. Scowcroft, and against Richard Mathias and Thomas Gwynne, to whom the plaintiff, Arthur Bowen, had assigned his share, upon certain trusts, for payment of his debts, and it prayed a partition of the estates.

By the decree made on the hearing of the cause, dated the 13th of July, 1835, it was referred to the Master to inquire and report to the Court what children of Mary Scowcroft were living at the time of the death of the said testator; and whether any children of the said Mary Scowcroft, deceased, were born subsequently to the death of the said testator, and whether any and which of them were since dead, and whether any and which of them who had died, died intestate or not, and who were the heirs-at-law or devisees of such of them who had since died; and if the Master should find that all the children of Mary Scowcroft who were then living, or the heirs or devisees of such

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of them who were then dead, were parties to the suit, then the said Master was to inquire and report to the Court what shares and interests the said plaintiffs and defendants respectively, or any or either of them, were respectively entitled to in the hereditaments.

The Master, by his report, dated the 1st of July, 1837, certified that the plaintiff, Arthur Bowen, by the will of the testator, or as the heir-at-law of the testator, or partly by such will and partly as such heir-at-law, became seised of or entitled to one-third part or share of and in the said hereditaments in fee simple: and by the said will, or as such heir at law, he also became seised of or entitled to an estate of inheritance in reversion, immediately expectant upon the decease, or other sooner determination of the estate for life therein of the plaintiff, Peregrine Bowen, of and in another third part or share of and in the same hereditaments: and that such two-third parts or shares of and in the said hereditaments, were then vested in the said defendants, Richard Mathias and Thomas Gwynne, upon the trusts of the indenture of release of the 12th February, 1833, in the report mentioned. And the Master found that the testator, by his said will, devised one-third part or share of and in the said hereditaments to the plaintiff, Peregrine Bowen, for his life; and that the plaintiff, Peregrine Bowen, was seised of or entitled to such third part or share, of and in the said hereditaments, for his life. And the Master found that the said testator, by his said will, devised one-sixth part or share of and in the said hereditaments, to the said Mary Scowcroft, formerly Mary Allen, for her life, and after her decease, the said testator devised such sixth part or share of and in the said hereditaments, to all the children of the said Mary Scowcroft, in equal shares, as tenants in common in fee simple; and that the defendants,

Charles Bowen Allen, John Allen, Peregrine Shaw Allen, James Scowcroft the younger, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, were seised of or entitled to such last-mentioned sixth part or share of and in the said hereditaments, as tenants in common in fee simple, in the following shares, that is to say, the said Charles Bowen Allen, to three-tenth shares of such last-mentioned sixth part or share, the said James Scowcroft, the younger, to two-tenth shares of such last-mentioned sixth part or share, and the defendants John Allen, Peregrine Shaw Allen, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, to the remaining five-tenth shares of such last-mentioned sixth part or share in equal shares; and the Master found that the said testator by his will devised one other sixth part or share of and in the said hereditaments to plaintiff, Lucy Bowen, for her life, and, after her decease, the testator devised such last-mentioned sixth part or share of and in the said hereditaments to all the children of the said Lucy Bowen in equal shares, as tenants in common in fee simple; and that the said Lucy Bowen was then seised of or entitled to such last-mentioned sixth part or share of and in the said hereditaments for her life, with remainder in fee simple to her children, if she should have any, in equal shares, as tenants in common; that the said Lucy Bowen had never been married; and that the remainder in fee simple of and in the said last-mentioned sixth part or share of and in the said hereditaments, on the decease of the said Lucy Bowen, was undisposed of, in the event of the said Lucy Bowen not having any child, and that the same, in that event, would descend to the plaintiff, Arthur Bowen, as the heir-at-law of the said testator; and that the interest which would so descend to the said Arthur Bowen passed, by the said indenture of the 12th day of February, 1833, to the

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said defendants, Richard Mathias and Thomas Gwynne, upon the trusts declared thereof by the same indenture.

To this report the defendant, James Scowcroft the elder, excepted, on the ground that the Master ought to have found that, by the testator's will, Mary Scowcroft took and became entitled to an estate in fee simple, or an estate tail, of and in one equal sixth part of the hereditaments; and that, by means of the fine levied by the exceptant and the said Mary Scowcroft, his then wife, at the Spring Great Sessions in the year 1825, and by means of the indenture of the 1st day of September, 1825, the said last mentioned sixth part of the said hereditaments became and was then vested in the exceptant and the plaintiff, Peregrine Bowen, as joint tenants for an estate in fee simple, or for a base fee, determinable on the failure of issue, inheritable under such estate tail.

The defendants, the younger children of Mary Scowcroft, also took two exceptions to the Master's report, the first of such exceptions being that the Master ought to have found that the defendants, Charles Bowen Allen, John Arthur Allen, Peregrine Shaw Allen, James Scowcroft the younger, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, were then seised of or entitled to the one-sixth part or share of and in the said hereditaments devised to Mary Scowcroft, as tenants in common in fee simple, in the following shares: that is to say, the said Charles Bowen Allen to one-eighth part or share of such last mentioned sixth part; the said James Scowcroft the younger to two-eighth parts or shares of such last mentioned sixth part; and the defendants, John Arthur Allen, Peregrine Shaw Allen, William Bowen Scowcroft, Martha Elizabeth Scowcroft, and Hugh Arthur Fender Scowcroft, to the remaining five-eighth parts or shares of such last mentioned sixth part or share, in equal shares; and the second exception

being, that the Master ought to have found that the sixth part or share, by the said will devised to the plaintiff, Lucy Bowen, was subject to a cross remainder, or an executory devise or limitation in the nature of a cross remainder, on the decease of the said Lucy Bowen and in the event of her not having any child, to or in favour of the persons to whom the other sixth part of the said hereditaments was given or devised by the said will; and that the exceptants and the said Charles Bowen Allen and Peregrine Shaw Allen were in that event entitled, or would in that event be entitled, to the same or the like shares and interest of and in the last-mentioned sixth part or share as they were then entitled to of and in the said sixth part or share originally devised to the said Mary Scowcroft, formerly Mary Allen, and her children.

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Mr. *Hodgson*, in support of the exception taken by the defendant, James Scowcroft, the elder.—The devises to the testator's brothers and sisters were devises in fee, with alternative devises to their children in fee, in case any of the brothers or sisters should die in the lifetime of the testator. As all of them survived the testator, they took absolute estates *in fee*. In *Turner v. Moor* (a), a legacy to A., or in case of his death to his issue, was held to give A. an absolute interest. In *Cambridge v. Rous* (b), legacies were given to two sisters, with a direction as to each, that in case of her death her legacy should devolve on her sister. This direction was held to be confined to the case of a lapse by the death of either in the lifetime of the testator, and that, surviving the testator, they took absolutely. In deciding that case, the Master of the Rolls observed: "As to the first question in this cause, whether Martha Kuyck Van Mierop was

(a) 6 Ves. 557.

(b) 8 Ves. 12.

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entitled absolutely to the legacy or for life only, the words in which the bequest over is expressed, have not, in themselves, nor have they by construction, received a precise and definite meaning in which they must be uniformly understood. The expression itself is incorrect, as it applies words of contingency to an event which is certain. No man can, with propriety, speak of death as a contingent event which may or may not happen. When, therefore, a testator so expresses himself, the question is what he means by that inaccurate expression. He may, perhaps, have had some contingency in his mind, as that the legatee was dead at the time he was making the will, or might be dead before his own death, or before the legacy should be payable; and then the inaccuracy consists in not specifying the period to which the death was to be referred." It is remarkable that in the present case, as in the case last cited, the testator was in India at a distance from the legatees, and might not know whether they were living or dead, and therefore might speculate upon that event. The words "in case of their demise" mean their death before some particular event, as the death of the testator himself. The expression is certainly ambiguous, but in *Ommaney v. Bevan* (a), and *Slade v. Milner* (b), similar expressions were held to mean the death of the legatee in the lifetime of the testator. It may be said that the cases cited were all cases of bequests of personal estate, whilst the present case is one of devise of real estate; but there is no substantial distinction; there is no greater authority for modelling the estate for life into an absolute interest or perpetuity in the one case than in the other. In *Chalmers v. Storil* (c), the testator gave to his wife and children all his estate, real and personal, to be equally divided among them, subject to two annuities, on death to devolve to his

(a) 18 Ves. 291.

(b) 4 Madd. 129.

(c) 2 Ves. & B. 222.

children equally, and in case of the death of the wife her portion to descend to the children equally; in the event of their dying before her, their portions to be enjoyed by the wife during her life, with a limitation over upon the death of all. In that case the question arose whether the bequest to the wife was for life or absolute, and the point with reference to the real estate was treated as doubtful by the Master of the Rolls, who directed a case. It does not appear what became of the matter subsequently. There are other cases involving the same principle. In *Doe v. Prigg* (a), there was a devise to A. for life, with remainder to the surviving children of William Jennings and John Warren, and to their heirs for ever, the rents and profits to be divided between them in equal proportions, share and share alike; and it was held that the word surviving referred to the testator's death, and not to that of the tenant for life. The difficulty there was, what meaning should be assigned to the word *surviving*. The word survivors or survivor necessarily imports a contingency. The first impression would therefore be that the gift was a gift for life, with a contingent remainder in fee. But in *Doe v. Prigg*, and in other cases, the word surviving was held to mean surviving the testator. This principle seems to go through all the cases, that wherever there is a contingency the contingency is referred to the death of the testator: *Clayton v. Lowe* (b), *Wright v. Stephens* (c). If the devises be treated as alternative devises, then the children would take the fee; and, treated as alternative devises, what has been contended on the part of the parents will equally apply to the case of the children. Where there are alternative devises, either devise may be read first. All that the Court requires to be satisfied of is, that the testator intends to give the fee away from the heir;

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(a) 8 Barn. & C. 231.

(b) 5 B. & Ald. 636.

(c) 4 B. & Ald. 574.

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and that being done, it is immaterial how it is moulded by the subsequent limitations. Supposing the fee to pass then, as all the brothers and sisters survived, they would take in fee. But if the Court should think the principle not to apply to all the four, but to be confined to the two sisters, still the argument would be the same. If extended to all four, then Peregrine and Lucy, being unmarried, might perhaps be held to take estates tail; while Mary, being married, might be considered to take an estate for life only, with remainder to her children in fee: *Wild's case* (a). On a devise to A. and his children, it was formerly held, that if A. had any children, the devise created a joint tenancy in fee in the whole of them: *Oates v. Jackson* (b). It is true that Sir *John Leach* held differently to this in *Jeffery v. Honeywood* (c).

That Peregrine took an estate in fee may also be contended on another distinct ground. The words used by the testator are, "I will and bequeath to my two brothers, Arthur and Peregrine, one third part each, share and share alike;" Arthur being the elder brother and heir-at-law, and Peregrine being the younger brother. If the words "share and share alike" be construed not to give them a tenancy in common in fee, but to apply to the share only, then the words "share and share alike" would be tautologous and unnecessary; but the clear meaning of the testator was, that his two brothers should be entitled in like manner. There being a devise to two persons, one of whom is the heir, as tenants in common, the devise amounts to a devise to both as tenants in common in fee, because the heir necessarily takes the fee. In *Dickens v. Marshall* (d), it was certainly held, that the words "share and share alike" created a joint tenancy; but the law is now the other way.

(a) 6 Co. 17.
 (b) 2 Str. 1172.

(c) 4 Madd. 398.
 (d) Cro. Eliz. 330.

It is material to distinguish this case from *Nowlan v. Nelligan* (a). In that case, the testator gave his whole property to his wife, making no provision for his daughter, expressing his knowledge that it was his wife's happiness, as well as his own, to see her comfortably provided for; but in case of death happening to his wife, he desired his executors to take care of the whole for his daughter. The interest given to the wife was cut down to an estate for life, with a remainder to the daughter absolutely. Any other construction would have defeated the testator's manifest intention. In the present case, if the testator's intention is to prevail, then it must be held that the devises in this case were alternative devises in fee, or else that estates tail were taken by Peregrine and Lucy, or by Lucy alone.

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Mr. *Spence* and Mr. *John Evans* for the defendant Charles Bowen Allen, the eldest child of Mary Allen, afterwards Mary Scowcroft.—Mary Scowcroft took merely an estate for life in the real estate, with remainder to her children in fee, as found by the Master. All the authorities cited in support of the proposition that she took a larger estate, apply to personal estate only. In cases of personal estate, where the first gift is indefinite, the gift is considered to be absolute for two reasons—first, the gift being indefinite, without limitation, is necessarily considered absolute; secondly, the words “in case of demise” following such a bequest, carry with them an air of contingency, which compels the Court to find a meaning for them, which it does by referring the words, in case of death, to the case of the death of the legatee in the lifetime of the testator. The expression itself, as observed by the Master of the Rolls, in *Cambridge v. Rous* (b), is incorrect. In *Turner v. Moor* (c) the Court relied on

(a) 1 Bro. C. C. 489.

(b) 8 Ves. 12.

(c) 6 Ves. 557.

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the word "or" as distinguished from the word "and," as shewing that a substitution was intended; and, in another case, the word "but" was relied on for a similar purpose. In the present case the word used is "and." No such construction, therefore, can prevail. *Turner v. Moor* and *Cambridge v. Rous* were both cases of legacies of personal estate; so, also, were *Lowfield v. Stoneham* (a), *Hinckley v. Simmons* (b), *King v. Taylor* (c), and various other cases which are collected in *Jarman's Powell on Devises* (d). It is equally clear that an indefinite devise of real estate, without words of limitation, only carries an estate for life. No modern decision can be found in support of the contrary proposition. The last case in favour of a contrary construction is the case cited from Pollexfen (e). In *Chalmers v. Storil* (f) there was a mixed devise of real and personal estate, and the decision, so far as it went, applied only to the personal estate. In that case the word "estate" was also used, which might perhaps have been contended to pass the fee. In *Doe v. Prigg* (g) the decision turned upon the word "surviving." The only question there was, whether children surviving meant children surviving at the death of the tenant for life, or children surviving at the death of the testator. There was no attempt to convert an estate for life into an estate in fee. In *Clayton v. Lowe* (h), the devise was not indefinite, being, in the first instance, to the grandchildren in fee; and the rule is, that where a devise in fee is followed by several alternative limitations over, which aggregately provide for the death of the devisee under all circumstances, the case is analogous to that of a limitation if he die generally, and are therefore held to refer to the

(a) 2 Str. 1261.

(b) 4 Ves. 160.

(c) 5 Ves. 186.

(d) Vol. 2, p. 764.

(e) *Fortescue v. Abbot*, p. 479.

(f) 2 Ves. & B. 222.

(g) 8 B. & Cr. 231.

(h) 5 B. & Ald. 636.

death of the devisee in the lifetime of the testator. *Clayton v. Lowe* is referred to in Jarman's Powell on Devises (a), as shewing the effect of this rule. In *Fortescue v. Abbott* (b), it was taken for granted by all parties, that the devise was of an estate for life only, and the question was, whether it was a vested or a contingent remainder.

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Mr. *James Russell* and Mr. *Hindes*, for the defendants, some of the younger children of Mary Scowcroft.—Mary Scowcroft took only an estate for life, with remainder to her children in fee. It is contended as one point that those children only are entitled who were living at the death of their mother; but without carrying the argument so far, it may be sufficient to contend that Mary Scowcroft took an estate for life, with remainder to all her children as a class: *Billings v. Sandon* (c).—On the part of these defendants similar arguments, as to the distinction between devises of real estate and bequests of personal estate, as those urged on the part of the defendant, Charles Bowen Allen, were addressed to the Court, and the same cases, and also *Jeffery v. Honywood* (d), were relied on.

Mr. *Elderton*, for one of the younger children, contended that Mary Scowcroft took an estate for life, with a vested remainder in fee to such of her children as were living at the death of the testator.

Mr. *Campbell*, for the defendants Mathias and Gwynne, the trustees of the plaintiff, Arthur Bowen, the heir-at-law.—All the cases cited are cases which were decided on

(a) Vol. 2, p. 765.

243.

(b) Pollex. 479; Sir T. Jones,
 79; Fearn's Contingent Rem.

(c) 1 Bro. C. C. 393.
 (d) 4 Madd. 398.

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their own special circumstances. It is admitted in all the cases, that the words "in case of death" are ambiguous. In *Galland v. Leonard* (a), the property was entirely personal, and the whole interest in the personal estate was conferred by the will on the tenant for life. The words in case of the death were held to mean, not the death of the testator, but of a prior tenant for life. The circumstances of that case have no application to the present. [*Alderson, B.*—Is there not a fallacy in arguing that, because an indefinite devise of land is construed a devise for life only, that such was the intention of the testator? The probability is, that in all these cases the testator meant what is generally understood by the words used by him. In nine cases out of ten, as to personal estate, the construction is according to the testator's intention; but on the contrary with regard to real estate.] This case is not attempted to be argued on the intention of the testator, but on the legal construction of the words used; and the intention must be considered to have been according to the legal construction. [*Alderson, B.*—The first point is, whether the devise extends to all four devisees. The will contains a passage, following the devise, to which my attention has not been called. The passage to which I allude is this:—"Observing, first, that my dear father, William Bowen, sen., Esq., is entitled to raise the sum of 2,000*l.* sterling, by mortgage or otherwise, according to a bond or deed executed by me to him on the 15th day of April, 1802, for that purpose." I presume that this was a charge upon the whole estate.] If one part of the will may be read in a parenthesis, so, unquestionably, may this. The whole effect of the passage, however, is merely to notice the charge, and that the devisees are to take subject to this charge, as also to the prior estate for life of the testator's father. The rule dedu-

(a) 1 Swanst. 161.

cible from all the cases seems to be, that where, from the general context of the will, it may be collected that the testator in using the terms "in case of the death" of a legatee, intended that the legacy should go over upon his decease, *whenever it might happen*, then the words denoting a contingency should be rejected, and a vested interest be presumed. The rule is so stated in *Roper on Legacies* (a). In *Slade v. Milner* (b), there was an immediate indefinite gift, and therefore of an absolute interest. In *Turner v. Moor* (c), the legacy was to A. absolutely, "or," in case of his death, to his issue; which was a clear alternative gift. In *Billings v. Sandon* (d), the words used were the same as in the present case. In *Nowlan v. Nelligan* (e), the words used were nearly the same, but there was an implied trust for the daughter. All the cases were cases relating to personal estate. In *Lord Douglas v. Chalmer* (f), which was also a case of personal estate, the bequest was to A., and, in case of her decease, to her children, share and share alike; and it was held, that A. took an estate for life, with remainder to her children absolutely. In all the cases, where the rule of substitution has been adopted, if the words used had been the same which are to be found in the present case, it would have been held that there was a clear remainder. In either case, whether there be a substitution or not, the estate devised is only of an estate for life. The meaning of substitution is, to substitute some person for another person to whom the estate has been previously devised, and for the same estate, and not to devise the estate to one for life, and then, in case of the death of that person, to give it to another for a larger estate. It has been argued, that the words "in case of their de-

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(a) Vol. 1, p. 524, 3rd edit.

(b) 4 Madd. 144.

(c) 6 Ves. 557.

(d) 1 Bro. C. C. 393.

(e) Id. 490.

(f) 2 Ves. jun. 501.

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mise" apply to all the brothers and sisters; and this has been put upon the principle of equality. The devise, however, to the two brothers in the will is totally separate from, and unconnected with, the devise to the two sisters, and the words used are different in each devise; and there is a distinct sentence between the two devises. The construction contended for would be contrary to the rule of grammatical construction, which is to refer the words "in case of their demise" to the last antecedent, that is, the two sisters to whom he had given the one-third, that is, the one-sixth each. In *Chalmers v. Storil* (a), in case of the death of the wife, the portion of the wife was directed to devolve on the children equally. That, also, was the case of personal estate; there being no devise of real estate. There is a total distinction between this and *Wild's case*. In that case, the devise was to A. and his children, or issue; in the present case, the words are, "to the children and their heirs." This distinction was taken in *Ives v. Legge* (b), and the principle was acted upon in *Jeffery v. Honeywood* (c). It has also been contended, that, as Arthur takes an estate in fee, Peregrine takes an estate in fee likewise, because the devise is of one third part each, share and share alike; but that construction cannot arise until the fact is obtained that Arthur takes the fee as the heir-at-law. It was not the intention of the testator to die intestate: he did not anticipate the uniting of the fee in Arthur, as heir-at-law, with the estate for life which he devised to him. *Fortescue v. Abbott* does not bear upon the present case. In *Goodtitle v. Edmonds* (d), the Court excluded the strained construction now sought to be put on the words "share and share

(a) 2 Ves. & B. 220.

(c) 4 Madd. 398.

(b) *Fearne on Contingent Remainders*, 377.

(d) 7 Term. Rep. 675.

alike." In *Dickens v. Marshall* (a), the question was, whether the parties took as joint tenants, or tenants in common. That case, however, excludes the construction attempted to be put on the words "share and share alike." In that case it was also held, that the devisees took estates for life, although one of them, as in the present case, was also the heir-at-law. So also, in *Pettywood v. Cook* (b), under a devise of three houses to the testator's wife for life, with remainder, as to one house, to each of the testator's children in fee, and with a clause that, if any of them should die without issue, the survivors should enjoy *totam illam partem* equally between them, it was held, that these words gave the survivors an estate for life only.

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Mr. Hodgson, in reply.—Admitting that the cases cited on the part of James Scowcroft, the elder, are cases of personal estate only, still it is contended that no substantial distinction exists in this case between a bequest of personal estate and a devise of real estate. It has been argued on the other side, that an indefinite gift of land is a gift of an estate for life only, but this is not quite accurate. It is true the devisee, according to the construction of law, takes for life only, but that is not according to the intention of the testator. All the Judges have lamented this, and a clause is inserted in Lord Langdale's bill for altering the law in this respect (c). This rule of law seems to have been arrived at in modern times. There is an obvious distinction between a gift after the decease of the devisee, and a gift in case he should die. In *King v. Taylor* (d) the case of *Nowlan v. Nelligan* was discussed, and in that case a clause of survivorship between two

(a) 1 Cro. Eliz. 330..

(b) Id. 52.

(c) See stat. 7 Will. 4 & 1 Vict.

c. 26, s. 23.

(d) 5 Ves. 186.

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legatees, if either of them should die, was confined to a case of lapse, and did not prevent the legacies vesting. In the present case, as in *King v. Taylor*, all that the testator intended was to guard against a lapse by the death of the legatee in his life time. What could the testator mean by the words "in case of their demise." If he meant after their death, then there would be a gift to the children, not by construction, but by express words: there is nothing in the will to shew that he meant any thing more than to guard against a lapse. If so, the gifts are clearly alternative gifts. Words of inheritance are annexed to the gift to the children, which demonstrate an intention to disinherit the heir in one case, and why should not the same principle apply to the other. It has never been decided that the rule of law applies to personal estate only. To which of the devises do the words of inheritance apply? It has been said, that according to grammatical construction, they must be confined to the last antecedent, the devise to the two sisters, but this is begging the question. There are various devises throughout the will, and the words "in case of their demise" apply just as forcibly to the whole of the devises as to one of them. The reference to the charge in favour of his father shews also that the testator had the whole of the estate in his contemplation. All the devises are alternative devises; there is no distinction in the shares, and the devises operate to give a fee to all the devisees. As to *Wild's case*, the rule there laid down is, that if A. devises lands to B. and to his children or issues, and he hath not any issue at the time of the devise, the gift is an estate tail; this, however, is contrary to the intention of the testator, for the gift is immediate.

With respect to Peregrine's share, it must necessarily be assumed that the testator knew that the devise to Arthur would have no operation, but that he would take

in his character of heir-at-law; and by the gift to Peregrine in the same terms as the gift to Arthur, he must have intended that Peregrine should take in the same manner, as he must be assumed to have known that Arthur would take. With regard to the shares given to Lucy and Mary, a clear difference exists, one being tenant in tail, the other tenant for life; the remainder in the one case is clearly vested, in the other contingent.

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ALDERSON, B.—In this case I have considered the will of the testator, and the points submitted in the argument to me.

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The testator, by his will, bequeaths to his brothers Arthur (his heir-at-law) and Peregrine, one-third part each, share and share alike, of the lands and premises in Prendergast and Ambleston, and the other remaining third part of the said lands to his sisters, Mary and Lucy, share and share alike, making a sixth part to each; and then (he adds), "And in case of their demise, I will and bequeath their respective shares or proportions to be equally divided amongst their children or their lawful heirs." In the latter part of his will he also bequeaths the whole of his personal estate, subject to his legacies, to his brother Peregrine.

Now, on this will, several questions have been made, but I do not purpose to consider them in the order in which they were made, because a more simple course seems to me to be to state the view I take of the will.

In the first place it seems to me that the words "in case of their demise" are only applicable to the devise to the two sisters, and have no reference to the previous devise to Arthur and Peregrine. The consequence is, that the question as to Peregrine depends, in my judgment, on the first devise alone—and there being no words of inheritance, I think he only took an estate for life. The

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words share and share alike in a devise to him, jointly with the heir-at-law, were relied on. But I think these words insufficient. There were similar words in *Doe v. Edmunds*, and *Dickens v. Marshall*, but they were held insufficient; and, besides, in this case the testator, in the subsequent devise, construes these very words by the words "making one-sixth part," which have reference only to the extent of land given, and not to the quantity of estate. It is said that the intention must have been to leave *both* brothers an equal interest. That may be so, but I cannot act upon a mere conjecture, which, even as a conjecture, is shaken by the next bequest of the whole personalty to Peregrine alone, which, for aught I can tell, may have been the way in which the testator intended the equality to arise.

I think, therefore, that Peregrine took an estate for life only in one-third part.

Secondly, as to the estates given to the sisters. The question is, what meaning is to be given to the words "in case of their demise." Mr. *Hodgson* contended that these words mean "in case of their demise before the time of my decease," thereby making the devise to the children and their heirs a substitution for the devise to the parents. And if so, there is good ground, no doubt, for contending that the intention was to give to the parents, as well as to the children, a fee simple.

Many cases to this effect were cited; but they were all cases of personal property, and no case has been, or I believe can be cited, in which such a construction has been applied to a devise of land. There is an obvious distinction between the two. A bequest of personal estate to A., gives him the whole interest—a devise of land to A., gives him only a life interest. In the former case, therefore, the words "in case of their demise" preceding a bequest over, cannot well have their proper effect except by considering them as applicable to a bequest over as a

substitution for the previous gift, in case the party to whom it is given should not survive the testator. But in the case of land, the most natural meaning of the words, (which seems to me to be "after their demise,") may very reasonably have its full effect. In reading this will, therefore, I think I ought to give that meaning to the words used by the testator; and then there is no doubt that the Master is right in coming to the conclusion that Mary Allen took an estate for life in one-sixth, with remainder to her children in fee as tenants in common, and that, in the events which have happened, Charles B. Allen is entitled to three-tenths thereof, James Scowcroft, jun., to two-tenths, and the other children to one-tenth each.

Lastly, as to Lucy Bowen's share. It was contended as to this, that she took an estate tail, having no children at the time of the testator's death. But I think this is not so, and that it is distinguishable from *Wild's case* on the same grounds as were taken by Sir *John Leach*, in *Jeffery v. Honywood*. Indeed, on this part of the case, *Jeffery v. Honywood* seems precisely in point.

I think, therefore, that in this part of the case also, the Master has drawn a right conclusion from the will.

All the exceptions, therefore, must be overruled.

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Upon a bill filed by a judgment-creditor one day before the stat. 3 & 4 Will. 4, c. 27, came into operation, to obtain the benefit of a judgment entered up and docketed 28 years ago, since which time it did not appear that the creditor had taken any steps to enforce payment of his demand:—

Held, that the plaintiff was barred of all equitable relief by lapse of time alone, independently of the question, whether satisfaction of the judgment could or could not be presumed.

Upon a bill filed by a creditor to enforce a judgment of 28 years' standing, the plaintiff, in order to rebut the presumption that the judgment had been satisfied, gave evidence of the insolvency of his debtor during the greater part of that period:—*Held*, that such evidence would not avail the plaintiff against the unexplained fact of his not having sooner attempted to enforce the judgment, and that, to obtain relief in equity, he was bound, under the circumstances, to shew to demonstration that the judgment had been satisfied.

Seemle, that since the stat. 9 Geo. 4, c. 14, an acknowledgment of the debt by the debtor to a third person is not sufficient to take the case out of the Statute of Limitations.

Where the records of certain proceedings in a Welch court of judicature had by an order improperly obtained in this Court been deposited with an officer of this Court:—*Held*, nevertheless, that they were to be deemed to be in the proper custody until the order so obtained should be rescinded.

IN Easter Term, 1805, the plaintiff and the late Dr. Hughes, as executors of the will of Thomas Williams, Esq., late of Llanidam, in the county of Anglesey, obtained and entered up a judgment in the Court of King's Bench against Thomas Grindley for the sum of 3,375*l.* and costs, which judgment was duly docketed. At the time of entering up this judgment, Grindley was seised in fee of two estates in the county of Carnarvon, and several estates in the county of Anglesey. The estates in Carnarvonshire were subject to a mortgage to one William Casson for 800*l.*, which was secured by an indenture of demise, dated the 5th of August, 1804, for the term of 500 years. The other estates were subject to a mortgage to a Mr. Roberts for the term of 500 years, under an indenture of demise, dated in 1802.

On the 30th of November, 1805, Grindley agreed, by articles in writing, to sell two of the estates to Robert Morris, as agent for William Alexander Madocks, for 1,120*l.*; and he, on the same day, and in the same manner, agreed to sell two others of the estates to W. A. Madocks for 4,130*l.* These agreements comprised both the estates in Carnarvonshire. At the time of this transaction, notice, in writing, of the judgment for 3,375*l.*, was served by the plaintiff on Morris, as the agent for Madocks.

Subsequently to these agreements, another agreement

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respecting the same premises, bearing date the 13th of December, 1806, was executed by Grindley and Madocks. By this document it was stipulated that the conveyances should be prepared, on behalf of both parties, by Mr. Shadwell; that a proper abstract of title should be furnished on or before the 30th of December; that all mortgagees and other proper parties should join in the conveyances; and that the premises should be conveyed on or before the 1st of February following, when the remainder of the purchase money should be paid. The agreement then contained the following clause:—"And the said Samuel Grindley agrees that the said conveyance shall contain all proper and necessary covenants for the title to the said farm and hereditaments; and he declares and engages that the incumbrances now affecting the same are the following only, which are to be paid out of the said purchase money, and the mortgage assigned to the said William Alexander Madocks, or a trustee nominated by him, on or before the 1st day of February next:—To the executors of the late Thomas Williams, Esq., about 1,300*l.*, and interest from April, 1804; to John Roberts, of Newsfynydd, 800*l.*, and interest; to Mr. Casson, 600*l.*, and interest."

By indentures of lease and release of the 20th and 21st of March, 1810, and made between Grindley of the first part, J. B. Sparrow (since deceased) and the defendants, H. R. Williams and John Bradley, of the second part, and the several other persons, creditors of Grindley, who should by themselves or their agents execute the said indenture of release, of the third part, it was witnessed, that for the considerations therein mentioned, Grindley released and conveyed to the use of Sparrow, Williams, and Bradley, and their heirs, all the above mentioned estates, subject to all leases and mortgages or annuities affecting the premises, upon trust, with all convenient speed to sell the same, and, after payment of all costs attending the trust,

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to pay off a certain mortgage therein stated to be due to William Harvey, Esq. (which was afterwards satisfied), and all other mortgages and annuities affecting the premises, and pay and divide the clear residue of the purchase monies towards payment of the creditors, parties to the said indenture of release, their respective executors, &c.; and the surplus, if any, to such persons as Grindley should appoint, and subject thereto, to the use of Grindley, his executors, administrators, and assigns.

Neither the plaintiff nor his co-executor, Dr. Hughes, was a party to this deed of trust.

Soon after the execution of this deed, Grindley died, leaving his son, the defendant, Samuel Grindley, his heir-at-law, and his widow, Sarah Grindley, his administratrix.

On the 28th August, 1810, a bill was filed in the Court of Great Session, by the creditors under the trust deed, against Samuel Grindley the son, Sarah Grindley, and the trustees, praying the usual accounts of the intestate's personal estate and effects, and that the same might be applied in payment of their debts; and that, if necessary, the real estates of the intestate might be sold for that purpose. Upon the cause coming on for hearing on the 1st April, 1811, the Court directed the accounts to be taken, and an inquiry to be made as to the real estates of the intestate, and the incumbrances affecting them; and on the 19th of August, in the same year, the Registrar made his report, stating, amongst other things, the contracts between Grindley and Madocks, and that the same had not been completed; when the Court, by its order on further directions of the same date as the report, ordered and decreed that the trustees, Sparrow, Williams, and Bradley, should be at liberty to complete the agreement with Madocks, and receive the remainder of his purchase money. Upon Madocks failing to complete the purchase, pursuant to this order, a further order was made that the trustees should be at liberty to file a bill against him. They, ac-

cordingly, in the year 1815, filed their bill in the Court of Great Session against Madocks, to compel him to complete the contracts; but it appeared that he was then out of the jurisdiction of that Court, and in embarrassed circumstances, and no further proceedings were had in that suit.

All the estates comprised in the trust-deed were ultimately sold, subject to existing incumbrances, and the money paid to the creditors.

While these proceedings were going on against Grindley and his representatives, it appeared William Casson was taking steps to recover the 800*l.* due upon his mortgage. For that purpose he, in 1808, filed a bill of foreclosure against Grindley, which was afterwards continued against Madocks. In August, 1810, Madocks paid off this mortgage, and took an assignment of the mortgage term of 500 years to a trustee for himself. Afterwards, by an indenture dated the 28th December, 1811, he granted an annuity for three lives to Edward Stone, (since deceased,) on the security of the Carnarvonshire estates, on which occasion the term of 500 years, so held by Madocks' trustee, was assigned to the defendant Metcalfe, in trust for Stone. By another indenture dated the 1st February, 1812, Madocks granted a similar annuity to James Bellamy, (since deceased,) upon the security of one of the estates in Anglesey. Upon that occasion Bellamy paid off the mortgage to Roberts, and Roberts's term of 500 years was thereupon assigned to a trustee in trust for James Bellamy.

Madocks died in 1828, without having, as it appeared, completed his contracts to purchase.

The annuities having become in arrear, the annuitants, or their representatives, took possession of the lands on which the annuities were secured. At the time of the institution of this suit, the interest of Edward Stone was represented by the defendant Girdlestone, as his sole executor; and that of Bellamy, by the defendants Girdlestone and John Bellamy.

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The bill, which was filed the day before the late Statute of Limitations (a) came into operation, alleged, that at the time when the judgment was so entered up against Samuel Grindley he was utterly insolvent, and so remained until the time of his death; and all his lands, hereditaments, goods, and chattels, were so mortgaged and incumbered, that even if the plaintiff had taken out execution on the judgment, he could not have satisfied it by taking the person or property of Samuel Grindley in execution. The bill also charged collusion between Madocks and the trustees, whereby the latter were induced not to take the proper proceedings against him; and further, that the plaintiff was wholly unable to avail himself of the judgment at law, owing to the legal estate in the premises being outstanding in persons wholly unknown to the plaintiff, who acquired such legal estate before the judgment was entered up.

The bill prayed that the plaintiff might be declared entitled to have the sum of 3,375*l.* so secured by the judgment, and the interest thereon, satisfied out of the hereditaments now in the possession of the defendants Girdlestone and Bellamy, and out of the purchase monies for the said hereditaments received by the trustees, subject however so far as regarded the Carnarvonshire estates to the mortgage of 800*l.*, if any thing remained due in respect thereof; but if the Court should think that the plaintiff was bound to pay what was due in respect of the mortgage, then that he might be at liberty to redeem the same, and having so done, might have his judgment satisfied in manner before mentioned. The bill then, after praying various accounts against the annuitants and against the trustees, prayed that, if necessary, this bill might be deemed and taken to be a supplemental bill to the creditors' bill in the Welch Court.

(a) Stat. 3 & 4 Will. 4, c. 27.

The plaintiff entered into evidence of the insolvency and embarrassments of Grindley and Madocks, from the time the judgment was entered up to the times of their respective deaths.

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Upon the counsel for the plaintiff tendering in evidence the proceedings in the Welch Court, in order to prove Grindley's insolvency,

The counsel for the defendants objected to the reception of such evidence; first, because the defendants were not parties to the suit in Wales, which as to them was *res inter alios acta*; and, secondly, because the documents did not come out of the proper custody, namely, that of the plaintiff's clerk in Court.

For the plaintiff.—Upon the first point, there is no doubt that these proceedings, if properly proved, are good evidence of the state of Grindley's circumstances at the time of that suit. Upon the other point, this is a supplemental suit, and the documents were placed in the hands of the plaintiff's clerk in Court under an order of this Court. [*Alderson, B.*—That order must have been improperly obtained. It does not appear that the proceedings in the Welsh suit have been transferred to this Court under the statute (*a*). How, then, can they be made evidence, except they come out of the custody of the proper officer of the Welch court?]

In reply, it was said that the order had been obtained *ex parte*, and that the attention of the Court was not called to the circumstances of the case.

ALDERSON, B.—The object of this evidence is to pauperize Grindley, and therefore it is immaterial whether

(a) 11 *Geo. 4* & 1 *Will. 4*, c. 70, s. 14.

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the defendants are or are not to be considered as parties to the suit in Wales. The fact of a suit being instituted against a party for the purpose of administering to his effects is evidence of his circumstances. In the same manner, in cases of fraudulent preference, you shew that writs have been issued against the party by third persons. It shews the *status* of the man. Upon the other point I have no doubt, as at present advised, that the order as to these documents was one which the Court had no right to make. But the question is, whether, though the order has been improperly made, the documents being in the custody of an officer of this Court under an order of the Court, are not in the proper custody. Upon the whole, I think it is not like the case of documents delivered to an indifferent third person. Upon inquiry, I find that under an order properly obtained, they would have been in the custody of the same officer who now produces them; therefore, until the order which has been obtained is rescinded, I shall consider them as coming out of the proper custody.

The cause then proceeded on the merits.

Mr. Boteler and Mr. G. Richards, for the plaintiff.—It is clear, upon the evidence, that the incumbrance of which the plaintiff claims the benefit, was subsisting down to Grindley's death; that it is now subsisting, and that they who claim against the plaintiff claim with full notice of it. In the abstract of title and other papers delivered to Mr. Shadwell, there is distinct notice of it, and those papers came from the hands of the Bellamys. The copy of the agreement of 1806, which is also in their hands, expressly refers to it, and it is noticed in the recitals of both the annuity deeds. Those deeds, after reciting the agreement of December, 1806, go on to say, that shortly after the agreement, Madocks was let into possession, but that no conveyance had been made to him by reason of

some of the claims remaining unsettled. The claims referred to could only be the debt to Williams's executors, because the others had been paid. Being thus affected with notice of the incumbrance, the legal estate which the defendants have got in for their protection utterly fails them. A legal estate, without notice of an existing incumbrance, is something; but of what value is a legal estate with notice? But then the defendants rely on lapse of time; and they set up that defence, not for the purpose of raising a presumption that the claim has been satisfied, but as an absolute bar. The view, however, which the Courts take of cases of this nature, is this—that after the lapse of twenty years, satisfaction will be presumed in the absence of circumstances tending to rebut the presumption. But insolvency on the part of the debtor destroys the presumption arising from lapse of time. In *Fladong v. Winter (a)*, Lord *Eldon* said, that taking that to be a case of presumption, it might be met by evidence to satisfy a jury that the debtor had not the opportunity, or the means of paying; and his Lordship referred to *Wynne v. Waring (b)*, as an authority for the principle now contended for. Now, here it is clear, that both Grindley and Madocks were in insolvent or embarrassed circumstances, from about 1808 to the time of their respective deaths. In 1810, Grindley makes over all his property to trustees, and no distribution has ever taken place amongst his creditors. Previously to that, a bill of foreclosure had been filed against him, which he was unable to answer. That mortgage was afterwards satisfied by Madocks, but the payment of it, and other matters, involved him in difficulties which ended in his insolvency. It is strongly in the plaintiff's favour, that Madocks, by whose hand the money was to be doled to him, never could specifically perform the agreement out of which the money was

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(a) 19 Ves. 196, 200.

(b) *Id.* 197, cited.

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payable. The plaintiff could not proceed personally against the parties, while a decree was pending in the Welch court, nor against the land while there was a mortgage.

Sir *Charles Wetherell*, Mr. *Girdlestone*, and Mr. *Metcalf*, for the defendants, *Girdlestone*, John Bellamy, and *Metcalf*.—A judgment-creditor coming into equity must be able to prove that he has used due diligence to enforce his legal claims. It is for this reason that a judgment-creditor, seeking equitable relief against the personal estate of his debtor, must shew that he has taken out execution under the judgment: *Angell v. Draper* (a), *Shirley v. Watts* (b). In this case, there has been a failure both of legal and equitable diligence on the part of the creditor. By his own shewing, this bill ought to have been filed thirty-two years ago; and the long delay which has arisen, gives ground for suspicion that the proceedings under the judgment were waived in order to accommodate *Madocks*. His being allowed to retain part of the purchase money for payment of the incumbrance, is strong to shew that the plaintiff meant to substitute his personal credit for the security of the judgment. Supposing, however, that such was not the case, the subsequent embarrassed circumstances of *Madocks* would rather be a reason for activity than for laches on the part of the plaintiff, and his failure in that respect would be a sufficient ground for dismissing the bill. We do not decline an issue, but if an issue were directed, it is impossible to distinguish between this case and *Williams v. Gorges* (c), where, under very similar circumstances, Lord *Ellenborough* directed the jury to presume that the judgment had been satisfied.

It is submitted, however, that the Court will dismiss this

(a) 1 Vera. 399.

(b) 3 Atk. 200.

(c) 1 Camp. 217.

bill. The defendants are in the situation of mortgagees, under terms of years antecedent to the plaintiff's judgment. It is said that they are not entitled to the benefit of those terms, because they took the annuities, with notice of the judgment. One ground of defence, however, is entirely distinct from the question of notice; because we say that the plaintiff shews no case to entitle him to stand in a court of equity, and ask to redeem us at all; and therefore although, directly, we could not sustain our claim by reason of notice, yet we have a right to displace the plaintiff altogether. The questions, in fact, are two: First, whether the plaintiff has established that he, as such a judgment-creditor, had a right to file a bill for redemption; and, secondly, if he had, whether his remedy is not lost.

Upon the first point, it is clear, that the plaintiff must shew what creates a lien on the lands sought to be effected. Now, there is no evidence that the judgment has been docketed. All that is proved is, that the copy of the judgment used in evidence, as compared with the original judgment roll, is correct. But this comparison is no proof of the docketing, for the roll and the docket are distinct things. The judgment debt, therefore, as proved, is not such as to give the plaintiffs a lien. Again, the plaintiff has not taken proper steps to keep alive the judgment, so as to bind the heir. The writ of *scire facias* is directed to Grindley's administratrix only, and calls upon her to shew cause why the plaintiff should not have execution of the goods and chattels of the deceased debtor. How can that be binding Grindley's heir? The authorities establish that the first step, in these cases, is to sue out a writ of *scire facias* against the personal representatives of the debtor, and upon a return of *nihil*, then to sue out a writ against the heir or *terre tenant*: 1 *Wms. Saund.* 4th ed. p. 6 c. note (4): p. 72 b. note (1) 3; p. 72 m.; 72 n. But nothing of that sort has been done in this case; and,

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therefore, even if the debt was originally a good judgment debt, the plaintiff has done nothing to bind the lands at law. How then, supposing Roberts's or Casson's mortgage to be in existence, can the plaintiff have a right to redeem them? He has done nothing to shew that he has such a lien as gives a subsequent incumbrancer a right to redeem a prior; and that being so, he can have no claim against the defendants, who are protected by the assignment of the mortgage terms.

Then as to the question of lapse of time. Length of time operates two ways; either as an absolute bar to the party claiming, or as an ingredient in the question whether satisfaction of the claim shall be presumed. The assignment of Roberts's term to the defendants was a mortgage title; and if so, the defendants cannot be in a worse situation than Roberts himself would have been in. It is clear, that undisturbed possession by a mortgagee for twenty years is a bar to the right of redemption. The law upon this point is well laid down by Sir *Lancelot Shadwell*, in *Ashton v. Milne* (a). "A court of equity," he says, "regards more the antiquity of possession by the defendant, than the novel accruer of title to the plaintiff; and will not interfere against a person who, claiming by a mortgage title, has been in possession more than twenty years without having recognized the right to redeem." Now, here it is not attempted to be alleged, that from the year 1805 to the 30th of December, 1833, the day before the late statute (b) came into operation, a single step was taken by the judgment creditor to assert his right. In 1805, when the purchase is made by Madocks, no proceedings are taken to enforce the judgment, but the plaintiff is satisfied with merely giving a notice of his claim to the agent of Madocks. Again, when the creditors' suit

(a) 6 Sim. 378.

(b) Stat. 3 & 4 Will. 4, c. 27. See ante, Vol. 1, p. 436.

is instituted in 1810, no advantage is taken of it by the plaintiff. It may be said, that having a judgment, he had no occasion to resort to the suit. But that argument cannot avail a creditor who uses such delay. If, by the decree in that suit, it appears that Grindley's property was not sufficient to pay his debts, and the plaintiff still fails to come in and enforce his claim, that circumstance strengthens the argument arising from lapse of time. Again, as soon as the plaintiff knew of the arrangement between Madocks and Grindley as to the 1,300*l.*, why did he not make his judgment available at law or in equity, and raise the money, subject to the two mortgages? Besides, by pursuing that course (supposing his claim to be valid) he could not have deprived the defendants of that equity of which he now deprives them, namely, a right of contribution from the owners of the other estates. A court of equity would have said, you shall not select any of the estates for the enforcement of your claims, but you shall raise the money *pari passu* out of all the estates. Reverting, however, to the main question, it is clear that the insolvency of the debtor in this case, will not be sufficient to counterbalance the general rule of equity, by which the claims of a creditor, who sleeps upon his rights for more than twenty years, is held to be absolutely barred, or, at least, is presumed to be satisfied. *Campbell v. Graham* (a).

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Mr. *Simpkinson* and Mr. *Duckworth* for the defendants, the trustees.—The case, as opened by the plaintiff's counsel, is different from that which is stated in the bill. The case, as stated in the bill, does not proceed upon the agreement of December, 1806, nor is there any attempt upon the pleadings to follow specifically the money which was set apart for payment of the incumbrances. It is a

(a) 1 Russ. & Myl. 453.

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common bill by a judgment creditor to have the money raised out of the purchased lands. The first question, then is, as regards the trustees, what possible equity the plaintiff can have in respect of the purchase monies of the lands sold by the trustees. This demand is, not that the judgment may be satisfied out of monies in the hands of trustees in possession of the land, but out of monies which have in fact been paid to the creditors under the trust deed, and expended by them in the purchase of other lands. There is no privity between the plaintiff and the trustees. He may have a claim on the purchased lands but not the monies. The deed of trust only extends to parties who come in under it; and when the trustees have got the monies and paid them to the parties, there is an end of it. But the trustees were not in possession of the estate at the filing of the bill. The plaintiff was no party to the creditors' suit in Wales, and it is impossible to say that he can be made a party, by means of a supplemental bill filed in this Court; though, if the proceedings had been removed here in the first instance, it might have been so.

Again, it is impossible on the framing of this bill, and even independently of that, for the plaintiff to institute a claim under the agreement of December, 1806, to which he was no party. That was a mere private agreement between two other persons, as to how he, the plaintiff, should be paid. So far from being bound or considering himself as bound by that agreement, he has filed a bill inconsistent with it and against it. As between him and the parties to it, he is a mere volunteer; there is no mutuality between them, even supposing the terms of the agreement were more precise.

Lastly, the plaintiff is barred by length of time. Upon this judgment of 1805 no proceeding is had till 1833. It is indeed noticed in 1806, and revived against the personal representative of Grindley in 1821. But how can that

judgment so revived affect the lands of Grindley? It is wild to contend it. [*Alderson*, B.—It leaves the judgment as of 1805.] Then the question is, whether, independently of the doctrine of presumption, a stale demand of this nature can be enforced in a court of equity. The case of *Fladong v. Winter* has been cited as having been decided on the ground of presumption, the presumption being there rebutted. That case, however, is distinguishable from the present, in the strong circumstance that the bill was not filed by the bond creditor for the enforcement of the demand, but that a suit having been instituted for the general administration of the testator's assets, he was allowed to come and receive payment of his debt with the other creditors. It is sufficient, however, to say that the true ground on which a court of equity proceeds, in regard to lapse of time, is not that of presumption, but that of delay. Though the claim be ever so valid and good, a court of equity will not interfere after long lapse of time: *Cholmondeley v. Clinton* (a), *Cuthbert v. Creasy* (b), *Baldwin v. Peach* (c).

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Mr. *Koe*, Mr. *Wilbraham*, and Mr. *Bellamy*, for other parties.

Mr. *Boteler*, in reply.—The filing of the bill by the trustees, in 1815, to compel Madocks to fulfil his contract, is evidence against the trustees that the plaintiff's judgment was outstanding. [*Alderson*, B.—It is evidence as against them that the purchase money was not wholly paid.] There exists the same sort of evidence against the annuitants. The whole agreement remaining to be performed, the Court will act upon it, as evidence that no money had been paid except what was paid *aliunde*. The mere acknowledgment that the agreement is unperformed,

(a) 2 Mer. 171; 4 Bligh, 1.

(b) 4 Bligh, 125.

(c) 1 Y. & C. 453.

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is evidence that nothing has been paid, until the contrary be proved. [*Alderson*, B.—It seems to me that such an acknowledgment is not inconsistent with the supposition, either that the money has been paid or the contrary. I have always thought, that if the facts proved are equally consistent with either of two suppositions, there is nothing to go to the jury.] The defendant, Girdlestone, acknowledges that he has papers in his hands belonging to his testator Stone, by which it appears that Casson's mortgage was subsisting between 1813 and 1818. As long, therefore, as the purchase is acknowledged to be incomplete, it must be considered so in every respect, except what is proved to the contrary. There is similar evidence against the Bellamys. As against all the annuitants, there is the evidence contained in the recitals of the annuity deeds. They shew that, in 1811 and 1812, Girdlestone and Bellamy admitted that something was due. [*Alderson*, B.—The question is, what is adverse possession in case of a judgment. Non-payment is adverse possession. If I tell *you* that I owe A. so much, and do not tell *him*, A.'s laches in not enforcing the judgment is the same, though I tell you of it every day of the week. Either something must be claimed by the creditor, or something must be communicated by the debtor to the creditor on which he proceeds to act.] An acknowledgment by the debtor to a third person takes it out of the statute; as, for instance, an acknowledgment by an acceptor. [*Alderson*, B.—No: that will not do. There must be that from which a continuing contract may be inferred. If a man were to write a letter to a third person acknowledging the debt, it would not take it out of the statute. Lord *Tenterden's* act (*b*) explains this.] If that be not sufficient evidence of acknowledgment, there will be great difficulty in proving acknowledgments in cases of this nature. But, at all

events, laying this part of the case out of the question, the bill having been filed before the statute of *Will. 4*, there is sufficient evidence of insolvency on the part both of Maddocks and Grindley to rebut the presumption of satisfaction. It is almost impossible to distinguish *Wynn v. Waring* from the present case.

Upon the general question, as to the plaintiff being barred by mere lapse of time, the cases which have been cited are distinguishable from the present. *Cholmondeley v. Clinton* was the case of a mortgagee holding adverse possession for more than twenty years; and it was determined, that the party coming into equity after that lapse of time should not be assisted to his remedy at law, although, with such assistance, he might have a legal remedy. Other cases have been cited, which were suits for discovery in aid of ejectments; but courts of equity distinguish between cases of that nature and those where a debt is directly sued for. *Fladong v. Winter*, and the judgment of the Master of the Rolls in *Hercy v. Dinwoody*, support that distinction, although, in the latter case, the creditors, under the circumstances, failed in their suit. The case of *Pickering v. Lord Stamford (a)* is, on the same ground, an authority for the plaintiff, as are also the principles of Lord Brougham's judgment in *Campbell v. Graham*. The case of *Ashton v. Milne* may be left out of the question, for it can only be supported on the ground that the bill, failing as to one co-plaintiff, failed as to both. No distinction was made in that case between possession under a mortgage title, and possession under any other title. The true doctrine on the subject is laid down by Lord Langdale in *Raffety v. King (b)*: "If the mortgagee enters not in his character or in his right of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and to the validity to

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(a) 2 Ves. 272, 581.

(b) 1 Keen, 617.

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the conveyance he takes; and he must take the estate subject to the duties which are attached to it." Here, it is difficult to see how Stone and Bellamy were holding as mortgagees under Roberts's title. They took an assignment to protect them, but they cannot be considered as holding as mortgagees in possession under the assignment by Roberts: their title is under the annuity deeds. *Christophers v. Sparke* (a).

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ALDERSON, B.—I have now to deliver my judgment on the two points which I reserved for further consideration, and which are both of them of importance.

The questions are, whether the plaintiff is barred by his laches, in not suing earlier for the relief which he now prays by his bill; and whether, if that be not so, the Court, taking all the circumstances into consideration, ought not to presume as a fact that the judgment on which he founds his claim has been satisfied, or direct an issue to try that as a question of fact by a jury.

The circumstances are shortly these:—In 1805, the plaintiff recovered a judgment against a person of the name of Grindley for a debt. That judgment having been properly docketed, became a lien on the real property of the debtor; but there being then, as now, an outstanding term created anterior to the judgment, the plaintiff's remedy was, from the beginning, a remedy in a court of equity alone. Subsequently to this judgment, the real estate in question was sold to Mr. Madocks in 1806, and by Madocks, was afterwards conveyed to the defendants; and the term to which I have before alluded was assigned to a trustee for the defendant's protection and benefit. It is conceded that, both when the sale to Madocks took place, and again when the conveyance was afterwards made to the defendants, both Madocks and the defendants had notice of the

judgment and of its remaining unsatisfied. The present suit was not instituted till 1883, twenty-eight years after the judgment; and with the exception of the notice given in 1806 to Madocks, the plaintiffs do not themselves appear personally to have done any thing in the intermediate period to enforce their rights. Much evidence has been given to shew that, from the embarrassed state of Grindley and of Madocks, it ought to be inferred that neither of them could possibly have satisfied the amount of the judgment; and the plaintiff desires me to infer from this, that the judgment has not really been satisfied, but is still outstanding and unpaid. But it is quite clear and undisputed, that for twenty-eight years the plaintiff has had the power of enforcing payment out of a sufficient fund by a suit in equity, and that he has taken no steps for that purpose. Upon full consideration, I am of opinion that he is now too late. I adopt the principles laid down by Lord Camden in *Smith v. Clay* (a): "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the Court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court. Therefore, in *Fitter v. Lord Macclesfield*, Lord North said rightly, that though there was no limitation to a bill of review, yet, after twenty-two years, he would not reverse a decree but upon very apparent error. '*Expediit rei publicæ ut sit finis litium*' is a maxim that has prevailed in this Court at all times, without the help of an act of Parliament. But as the Court has no legis-

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lative authority, it could not properly define the time of bar, by a positive rule, to an hour, a minute, or a year: it was governed by circumstances. But as often as Parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and appropriated it to similar cases in equity; for, when the Legislature had fixed the time at law, it would have been preposterous for equity, which, by its own proper authority, always maintained a limitation, to countenance laches beyond the period that law had been confined to by Parliament; and therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar. Thus, the account of rents and profits in common cases shall not be carried beyond six years, nor shall redemption be allowed after twenty years' possession in a mortgagee: *Jenner v. Tracey*, 1731; *Belch v. Harvey*: allowance being made for the ten years' disability given by the statute. By the like analogy, the House of Commons, in *Edwards v. Carrol*, determined that twenty years should bar a bill of review, because the statute *Will. 3* had barred all writs of error after that period." These principles I find to have received the approbation of Lord *Alvanley* in *Hercy v. Dinwoody* (a), and of Lord *Brougham* and the House of Lords in *Campbell v. Graham* (b).

Now, then, we are to apply these principles to the present case; and, if so, we ought to adopt in equity the same rule, *mutatis mutandis*, which prevails at law as to time. The rule at law is, that a bond or judgment cannot be enforced if nothing be done upon it for twenty years, and no circumstances can be shewn to explain the apparent laches of the party. By parity of reasoning, then, if more than twenty years have elapsed, and nothing has been done in equity, and no circumstance can be shewn to ex-

(a) 2 Ves. 87.

(b) 1 Russ. & M. 453.

plain that neglect, it seems to me that in equity, also, the party ought not to be allowed to succeed.

Now, that is the present case. Whatever may have been the circumstances which the plaintiff relies on to explain his not suing at law, or to shew that the judgment is still due, there is no reason at all for his not having proceeded in equity. It is clear that, for twenty-eight years, he has had an estate competent to the payment of this debt, against which he could have proceeded. Why has he not done so? Can he be said to have used that reasonable diligence, without which, as Lord *Camden* says, a court of equity will not help him? I think not, and the consequence must follow. The Court, as Lord *Camden*, says, "will be passive, and do nothing:" it will not act to dispossess the defendants of their better title at law. The same principle, as it seems to me, governed Lord *Eldon* in *Cholmondeley v. Clinton*. There, the plaintiffs were, it was said, not barred by lapse of time from bringing their ejectment; but their right had existed complete for relief in equity for more than twenty years, and they had not pursued it. Lord *Eldon* held, that though they might perhaps not be barred at law, they were barred in equity.

Even, therefore, if I were of opinion here that the plaintiff had a remedy still open at law, notwithstanding this lapse of time upon the judgment, I should think the doctrine of Lord *Eldon* would fully warrant me in holding that the unexplained laches in equity would bar the plaintiff in this Court.

It would be sufficient for me to stop here; but I may as well add, that, on the second point also, I think the defendants right. There are, undoubtedly, circumstances which have a tendency to shew that it is not probable that either Grindley or Madocks were ever in funds so as to pay off this debt; but I think that after a lapse of so long a period, without any attempt to enforce it by the plaintiff, the plaintiff ought to shew to demonstration that the judg-

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ment has not been satisfied. The case cited from Campbell (a) is fully as strong as this, and yet there Lord *Ellenborough* directed a verdict. The inference from lapse of time should as much as possible be treated as founded on a rule analogous to the Statute of Limitations, rather than as leading to a conclusion of mere fact. Few persons believed, I apprehend, in the cases of rights of way, or of lights, before the recent statute, that any such grants as used to be suggested in pleading ever were actually made; and yet every judge directed, after twenty years' usage, and every jury used to find, the fact of a grant in conformity to the usage. It is far better that it should be so treated. Undoubtedly, where very cogent evidence exists to the contrary, there are authorities which warrant a decision that a specialty, after a lapse of twenty years, may be treated as still unsatisfied. *Fladong v. Winter* (a) was put as one of such cases. As a question of fact, I should have drawn a different conclusion from the Master in that case; but the Master having so decided, I should have concurred with Lord *Eldon* in confirming that report, on the ground of the parties refusing to try the fact at law, which was the case there. In *Wynne v. Waring* (b), I think the evidence amounted to demonstration. Here, that is not so. The unexplained fact of no attempt to fix the land with the debt, is the strongest fact in the whole case to shew that the judgment was satisfied, and appears to me infinitely stronger than the facts of the embarrassments of Grindley and Madocks to the contrary.

I think, therefore, that, on the whole, the bill must be dismissed, with costs.

Decree accordingly.

(a) See ante, p. 670.

(b) 19 Ves. 197, cited.

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EDWARD HUNSTONE, of Leake, in the parts of Holland and county of Lincoln, gentleman, by his will dated the 3rd November, 1655, gave and devised all his lands and hereditaments in Leake aforesaid, after the death of Elizabeth his wife, to four trustees named in the will, and their successors for ever, to be by them, as trustees, from time to time disposed of according to the intents and purposes thereafter mentioned and declared, and to no other use, intent, or purpose whatsoever. The trusts then declared were as follows:—"First, that all such decayed gentlemen as can make it appear unto my trustees before named or their successors, that they are of my name and family, and of the age of forty years, or else so impotent as not otherwise able to get a living, shall be allowed by my said trustees or their successors, out of the rents and clear yearly profits arising out of the said lands, the sum of 10*l.* by the year, so far as the rents of the said lands will extend, and for and during their natural lives, the contrary not being occasioned by any extravagancy in their persons. Also my will is, that in case it happens there be not so many of my name and family as being qualified as aforesaid, so as to be made capable of receiving the yearly

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Testator devised an estate to trustees and their successors, upon trust that all such decayed gentlemen as could make it appear to the trustees that they were of the testator's name and family, and of the age of 40 years, or else so impotent as not otherwise able to get a living, should be allowed out of the yearly rents and profits of the lands 10*l.* each by the year for their lives, so far as the rents would extend. At the time of making the will the annual rental of the estate was about 50*l.*, but at the time of filing the information it amounted to about 500*l.*:—

Held, that this

was a proper case for a scheme for the future management of the charity; and that in preparing such a scheme the Master was to consider of the expediency of increasing the allowance and diminishing the number of the future objects of the charity, and also to define more accurately what class of persons (excluding all minors) the testator intended to benefit.

Where upon an information filed for the administration of a charity estate, the case proved by the relators was sufficient to induce the Court to direct a scheme, and to order the legal estate of the charity lands to be got in, but the information contained false charges against the existing trustees of culpable mismanagement and breaches of trust, the Court dismissed the latter part of the information, with costs, and gave the relators no costs up to the hearing as to that part of the information which was not dismissed.

Seemle, that where the relief obtained on an information relative to a charity might have been obtained on petition, the Court will give no costs to the relators up to the hearing.

A., B., C., and D., were co-trustees of a charity under a will, which directed that one trustee in rotation should be the acting trustee for the current year, and keep the accounts. A. being the acting trustee in a particular year, without the knowledge of the other trustees, applied some of the charity funds to his own use. At the expiration of the year A. delivered his accounts to B., who succeeded him as acting trustee, and at the expiration of that year B. delivered his accounts to C., who succeeded him in like manner:—*Held*, that D. was not answerable for the breach of trust committed by A.

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pension as aforesaid, that then such gentlemen as shall make it appear to my trustees or their successors to be of the family of the Godneys, late of Bagenderby, in the county of Lincoln, and so qualified as before mentioned, shall be made capable in like manner of receiving the said allowance as aforesaid for the term before mentioned, if the rents of the lands will extend so far. Also my will is, that in case that the two families of the Hunstones and Godneys before mentioned should happen to be extinct or reduced to some few persons, not so many as the estate will afford allowance unto as aforesaid, that then such person or persons that can derive themselves and make it appear to my trustees or their successors, is of the family of Robert Smith of Saltfleetby, in the county of Lincoln, gentleman, or of the family of Woodliffes, late of Toft Grange, in the said county of Lincoln, and of the qualification before mentioned, that then every such person or persons have the allowance aforementioned paid as aforesaid, so far as the estate will extend. Also my will is, that if there be not so many persons, both by affinity and consanguinity to be found, as may have allowance out of my estate as aforesaid, that then such person or persons living within the county of Lincoln, as can make themselves appear to my trustees aforesaid, or their successors, to be gentlemen, or persons of quality and merit, and so qualified as aforesaid, shall have the same allowance before mentioned, so far as the said estate will extend. Also, my will is, that if any of the person or persons before mentioned being admitted to the yearly allowance or stipend of 10*l.* as aforesaid, shall, by his or their imprudence, not keep themselves in such habit as in some sort is agreeable to the quality, that then my trustees and their successors, or the major part of them, shall have power to default so much annually out of his or their allowance or stipend as aforesaid as will buy him or them doublet, coat, breeches, hose, and shoes in some sort suitable for their quality and

condition. Also my will is, that if any of the person or persons before mentioned, being admitted to their yearly allowance or stipend of 10*l.* as aforesaid, shall, after the same received, grow debauched and profane, and live in any notorious crime and drunkenness, whoredom, or the like, and being thereof admonished by the said trustees or their successors, shall make little or no reformation, that then it shall be lawful for my said trustees or their successors to detain the said stipend or allowance, and absolutely for ever to discharge him thereof, and the same to bestow upon some of better merit, and as shall be qualified as the persons before mentioned are to be. And because my trustees or their successors may be the better enabled faithfully to discharge that reposed in them for the uses, intents, and purposes before mentioned and declared, &c., it is my will that when the before-mentioned trustees or the survivor or survivors of them, shall, after the death of my said wife, enter upon the before-mentioned lands for the intents before-mentioned, that such of my surviving trustee or trustees shall have power to choose to him or themselves, such or so many person or persons in the room and stead of the before-mentioned trustees then dead, as will make up the after-appointed number of four, provided the person or persons so to be made choice of as aforesaid be men of good families, in good esteem of the countrymen of considerable estates, men pious and religious in their lives and conversations, ministers as well as others, living and inhabiting within the county of Lincoln, and the same person or persons so duly elected as aforesaid shall have the same power and trust reposed in him or them to all intents and purposes, as if he had been one of my trustees named in this my will; and that I may not be frustrated in this my intention, my will is, that if it happen my said wife survive all my trustees nominated and appointed by this my said will, that the four ministers of Leake, Erangle, Lenorton, and Bennington, then being at the time of my

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wife's death, shall be my trustees to all intents and purposes, for the disposing of my estate as fully as the persons before named, and as if they had been particularly nominated in this my will; and if any of the said parishes of Leake, Erangle, Lenorton, or Bennington, should be destitute of a minister at the time of the death of my said wife, or that any of the said ministers within the said parishes should refuse to act according to this my will, then my will is, that those of the said ministers as are willing to act, shall have power, in like manner, to choose to themselves any other minister or ministers within the said part of Holland as my trustees above named have power of election in case of vacancies and default amongst them, and so successively to choose ministers out of the said towns or parts of Holland in like manner as my trustees before named are empowered in like cases to do. Also my will is, that upon my trustees' entrance upon my estate as aforesaid (being first made up by election as aforesaid, the number of four in case of death or other default amongst them), the senior by election amongst them shall, for the first year, be both receiver and expeditor of the profits of my said lands for the uses and behoofs before mentioned, allowing him yearly such reasonable charges as he shall expend in discharge of the said trust, and 5*l*. for his pains: provided that within one month after the expiration of the said year he pass his account for the said year unto the residue of the trustees or the major part of them, who are hereby desired, upon reasonable notice and warning given unto them by the said receiver and expeditor, to attend at some convenient place for the taking up of the same, and to have allowed them out of the said accounts at the taking up of them, a dinner not exceeding 20*s*. And so the next trustee, according to seniority of election, to take upon him the same trust of receiver and expeditor for the following year, in manner and form and to the intents before mentioned, and

so successively for ever. And further, my will is, that if any of the trustees shall, by any means whatsoever, perfidiously betray the trust hereby reposed in them, or convert the same to any bye-end whatsoever, upon due proof thereof to be made unto the rest of my trustees or the major part of them, it shall and may be lawful to and for the residue of my said trustees to expel and eject the said trustee from his trust, and to elect and choose another in his stead, of the same qualifications before mentioned, in like manner as they ought to have done in case he had died; and the said trustee so elected in his stead, to have the same power and trust committed to him as the several trustees have, which are by this my will nominated, viz. Joseph Whyting, Charles Rushworth, Francis Empson, and William Ross."

The present information, after stating the will, the death of the testator, the acceptance of the trusts by the trustees, and that certain lands had at different times been allotted to and purchased by the charity, contained the following statements:—That the lands at Leake, devised by the said will to the said charity purposes, and the lands and hereditaments comprised in the said allotment, and purchased as aforesaid, have, by the change of times and the advance of prices, become of considerable value; and that the same consist principally of a farm-house and buildings, and between 300 and 400 acres of arable and pasture land, and that the said lands are worth to let the sum of 30s. per acre, or thereabouts; and that the said charity estate and premises now produce, or the same, if properly let, would produce an income of from 600*l.* to 700*l.* per annum. That the defendants, George Holland, John Holland the younger, Richard Simpson, and William Cook, now are, or claim to be the trustees of the aforesaid charity estates and premises, but no conveyances or conveyance of the said charity estates have, or has ever been made to the defendants, or any of them; and the legal

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estate in the said premises is now outstanding in some person or persons unknown to his Majesty's Attorney-General. That the said George Holland, John Holland, jun., Richard Simpson, and William Cook, are now, and have for a great number of years, by themselves or their solicitor or agent, (who is a relation both of the said William Cook and of the said John Holland), been in the receipt of the rents and profits thereof for some such charitable purposes as in the said will mentioned. That between years of 1814 and 1828, Edward Hunnings, one of the then trustees of the said charity, with the consent or through the negligence of the said George Holland, who was then a trustee of the said charity, applied a sum of 156*l.* 17*s.* 9*d.* part of the funds of the said charity to his own use; and his Majesty's Attorney-General has not been enabled to ascertain in what way the remainder of such rents and profits have been applied and disposed of. That for a great number of years there have been few or no persons of the family of the testator, or of the other families hereinbefore named who are proper objects of the said charity; and it is alleged that there has been considerable difficulty in ascertaining what persons, not being of the aforesaid families, but resident in the county of Lincoln, are proper objects of the said testator's bounty; and that in fact no attempt has been made to devote any part of the said income for the benefit of gentlemen, or persons of quality and merit, being in the county of Lincoln, and qualified as in the said will mentioned; and the said rents and profits have remained unemployed, or have been accumulated by the trustees, and laid out on different securities; and that few persons now receive any benefit from the said charity, and his Majesty's Attorney-General has not been enabled to discover the particular qualifications of such persons that entitled them to the said charitable relief; and there is now a considerable yearly surplus of the said charity income, after making such few

allowances as aforesaid. That it will be beneficial that a proper scheme should be formed for the due application of the said charity income for the time to come, and that proper accounts should be taken of the rents and profits of the said charity estates, and that inquiry should be made into the circumstances under which the said charity estate has become vested in the present trustees, or in whom the same now is vested, or in whom the legal estate of the said premises is; and that, if necessary, new and additional trustees should be appointed, and the said premises conveyed to them accordingly; and that the said charity should be regulated in general by a decree of this Court.

The information then, after charging various acts of mismanagement of the estate by the trustees, by taking premiums from the tenants, cutting down timber, &c., and misapplying the monies derived from these sources, prayed that the charity might be regulated under the decree of the Court, and that a scheme for that purpose, and for the future application of the rents and profits thereof might be formed; that an account might be taken of past rents; that an inquiry might be directed into the circumstances under which the estate became vested in the defendants, and in whom the legal estate is now vested; that if necessary additional trustees might be appointed, and the estates duly conveyed to the continuing or new trustees; and that the defendant George Holland might be compelled to repay the said sum of 156*l.* 17*s.* 9*d.* so lost to the charity, &c.

The defendants by their answer admitted, that in consequence of the good management of the trustees for the time being, the charity lands had greatly improved in value; and that the lands in Leake, which in the year 1667 were let at a rental of 56*l.*, are now let at the annual rent of 500*l.*; but the defendants stated their belief, that this was the utmost value that could be obtained for them.

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They stated that the charity estate consisted of a farmhouse and buildings, and about 397 acres of arable and pasture land. They admitted that they were the existing trustees of the charity, and that George Holland had become a trustee in 1815, Simpson in 1823, Cook in 1824, and John Holland, jun., in 1832. They stated that, upon the death or retirement of a trustee, it had been the invariable custom for the surviving or continuing trustees to appoint a new trustee in the room of the trustee so dying or retiring, and to enter such appointment in the books of the charity; and that they, the defendants, had been appointed trustees in such and no other manner; and that no other conveyance of the premises than by means of such appointment had been made to them. They admitted that they were in the receipt of the rents and profits of the charity, and had occasionally employed the party named in the bill as their solicitor.

With respect to the breach of trust committed by Edward Hunnings, the defendants stated as follows:—That Edward Hunnings was a trustee and secretary of the charity, from the year 1814 to the year 1823; and that in or about the year 1818 he sold out a sum of 200*l.* 3 per cent. consolidated annuities, which were then standing in his name as the survivor of the trustees in whose names the same had been originally invested, and that he received the proceeds of such sale amounting to the sum of 159*l.* 17*s.* 6*d.* That George Holland was a trustee of the charity at the time of such sale, but that the said Edward Hunnings was at that time the secretary of the said charity, and that all the funds passed through his hands alone. That George Holland had not any notice of such sale at the time thereof; but at the next general meeting of the trustees, after the sale, he ascertained that such sale had been made; and that after such sale had been made, the same also became known to the other trustees of the charity for the time being. That as Edward Hun-

nings had continued duly to pay the interest on the said stock, and was a man of great respectability and reputed wealth, the trustees for the time being did not compel the said Edward Hunnings to replace the said stock. That, in the month of November, 1820, it was ascertained that Edward Hunnings was then insolvent, that at the time of his insolvency, he had in his hands other monies belonging to the charity, which, together with the produce of the sale of the said sum of 200*l.* stock, amounted to the sum of 470*l.* 13*s.* 3*d.* That the dividend upon his estate produced the sum of 313*l.* 15*s.* 6*d.*, which was received by the trustees for the time being, so that the loss to the said charity, by the insolvency of the said Edward Hunnings, amounted to the sum of 156*l.* 17*s.* 9*d.* That these defendants know not, nor can set forth, as to their belief or otherwise, how Edward Hunnings applied the said sum of 470*l.* 13*s.* 3*d.*; but that he did not apply the same, or any part, to his own use with the consent or through the negligence of the defendant George Holland. That, up to the time of the insolvency of the said Edward Hunnings, the defendant, George Holland, always believed that the said Edward Hunnings was ready, and willing, and competent to pay and apply for the purposes of the said charity, whatever he had in his hands belonging to the said charity.

With respect to the allegations contained in the information, relative to the objects of charity selected by the trustees, the defendants stated as follows:—That as such trustees as aforesaid, they have paid the whole of the rents and profits of the charity estates to persons who, at the time of election, and also by their subsequent conduct, were considered proper objects of the charity, with the exceptions after mentioned. [Here followed as exceptions the expences allowed by the testator's will, and 700*l.* for repairs]. That, for a great number of years, persons of the name of Hunstone, claiming to be relations of the said

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testator, received the donations given to them by the said will; that other persons, who also claimed to be relations of the said testator, but who were not of the name of Hunstone, did, for a considerable number of years, receive such donations; and that other persons of the name of Godney, and Smith, and Woodliffe also, for some time, received such donations. That, for several years last past, the families of Hunstone, Godney, and Smith, have become extinct, and there is now only one person of the name of Woodliffe, known to these defendants, who is entitled to and receives such donation; and that, for several years last past, but not for a great number of years, there have only been a few persons of the family of the said testator, or of the other families, who were proper objects of the said charity. That there has not been any difficulty in ascertaining what persons, not being of the aforesaid families, resident in the county of Lincoln, were proper objects of the said charity. That the defendants have, from time to time, as such trustees as aforesaid, according to their judgment, appointed such persons to receive the said donations as were, in the opinion of the defendants, qualified in manner in the said will mentioned to receive the same; and that, in manner aforesaid, the whole of the income arising from the said charity estates have been applied for the benefit of such persons.

The allegations contained in the information relative to mismanagement and misapplication of the charity monies by the trustees, were wholly denied by the answer.

At the hearing, the relators did not attempt to fix the existing trustees with any fraudulent breach of trust, except so far as related to the fraud of Hunnings. Upon that point, however, it appeared from the books that Hunnings was succeeded in his situation, as acting trustee, by John Holland, senior, who adopted Hunnings' accounts, and thereby, as it should seem, made himself responsible for the balance due from Hunnings. The circumstances connected

with this part of the case are noticed by the Court, in the course of the argument for the relators. As to the general management of the charity in regard to the selection of objects, it was difficult to say, upon the whole evidence, whether, since the decrease in the members of the testator's own family, the trustees had or had not in general fulfilled the intentions of the testator. In particular instances, however, it was evident that they had acted in opposition to the words of the will, as by applying the funds of the charity in binding out children as apprentices, &c.

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Mr. Cooper and Mr. Spurrier, for the relators. With respect to the point suggested by the information relative to the outstanding legal estate, it might fairly be questioned, whether, as there has been no conveyance of the legal estate since the testator's death, the power of appointment of new trustees has ever been legally exercised; and, in short, what acts of the several persons who have successively filled the character of trustees are valid. The relators, however, have no intention to press those questions, and merely ask for a reference to the Master for the purpose of ascertaining what has become of the legal estate, and whether the trustees have been duly appointed for the purpose of an equitable administration of the trusts of the will. On the Master's report, the Court will have no difficulty in dealing with the case under the stat. 11 Geo. 4, and 1 Will. 4, c. 60, s. 23.

The main object of the present proceeding, is the formation of a scheme for the future government of the charity. The founder has laid down no rules or provisions for that purpose. It rarely happens that a founder omits to give to some party or other the power of framing rules for the management of his charity; but in this instance he has. The Court, therefore, of necessity, will provide a scheme for that purpose, on the ground of the

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increased income of the charity—no mode pointed out for ascertaining proper objects of relief—no provision for appointing an additional officer, supposing it necessary—and no power in the trustees to increase the allowances. It is sufficient to mention two cases, which shew that a court of equity is the proper tribunal for administering a charity where there is no general statute, and where, from a change of circumstances through a long lapse of time, a different administration of the funds is necessary: *Attorney-General v. Clarendon* (a), *Attorney-General v. Mercer's Company* (b). In the latter case it was held, that in consequence of the change in the value of money, and in the circumstances of the times since the charity was founded, and also of the great increase of the fund, the sums appropriated to the purposes of the charity should be augmented: and, in regard to particular sums, an increase was made from 200*l.* to 500*l.* That decision is applicable to the present case. Here, not only the former, but the existing trustees, have, without any authority, increased the allowances from 10*l.* to 15*l.* They have likewise appointed an additional officer, which they had no right to do; the will providing only for a receiver or expeditor. The secretary whom they have appointed is one of their own body, and receives a salary for his trouble. They have laid out 700*l.* in repairs. They have employed a solicitor in the investigation of claims, that solicitor being brother of one of the trustees. All these may be proper acts, and they are not mentioned as matters of blame to the trustees; but the mere fact that recourse has been had to such proceedings, shews that some regulation on the subject is necessary.

There are, however, some very serious charges against the trustees of this charity, which ought to be adverted to. It is conceded that those charges affect the former trus-

(a) 17 Ves. 491, 500.

(b) 2 M. & K. 654.

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tees rather than the present, but they serve, nevertheless, as ground for an application for a scheme. The alleged misconduct of the trustees consists in the allowance of the benefits of the charity, to persons under forty years of age, and even to infants—the lending the funds of the charity to the trustees—the borrowing of the money by the trustees while they had money out on loan—the trustees themselves becoming objects of the charity—and the sale of stock and conversion of it to the use of a trustee, who has become insolvent. [*Alderson, B.*—The misconduct of former trustees is not of much importance. The evils committed by them seem, generally speaking, to have been corrected of late years.] Confining ourselves to the charges against the present trustees, they have not taken sufficient care to find out proper objects of the charity. They ought to have taken active steps by means of advertisements, or otherwise, to encourage applications. In a case like the present, courts of equity hold, that trustees should be active. Generally speaking, the primary object of the founder of a charity is to provide a general maintenance for deserving persons, and then a preference is given to the founder's kin; but here, the primary object is to provide for those of the founder's name and family, and then for others, who, though of his name, might not be of his family. The testator's intentions, therefore, could not be followed up, without active care and management on the part of the trustees; and in that they have been grossly deficient. They are likewise accountable for the conduct of Edward Hunnings. There is a clear admission, that from 1814 to 1823, he was acting trustee and secretary, and had all the funds in his hands, although the will expressly directs that the election of the expeditor shall be annual. In 1817 a sum of 200*l.* stock which had been placed in the funds at different times, was standing in the name of Hunnings, as the survivor of those persons, in whose joint names it had originally been invested. When

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the trustees found that this sum was under the control of one, when it ought to have been under the controul of four, they should have interfered. They omitted however so to do, and in 1817 or 1818 Hunnings sold out the stock. The defendant, George Holland says, that when this took place he was not aware of the circumstance, though he admits he was a trustee at that time. He was, however, made aware of the circumstance at the next general meeting, which took place after the sale of the stock, which was in 1818. The accounts were then audited, and he and the other trustees were informed of the breach of trust which had taken place. It was, therefore, his duty, as it was also that of the other trustees for the time being, to take immediate steps to have the money called in. He, however, does not do that, but permits Hunnings to go on paying interest on the stock, and receiving all the monies of the charity during the years 1818-19 and 20. In 1820 Hunnings became insolvent, whereby a loss occurred to the estate of 156*l.* 17*s.* 9*d.* Notwithstanding this, he was suffered to remain a trustee till 1823, when he retired, and to continue secretary at 5*l.* per annum till 1828, when he died. The conduct of the trustees in retaining this man as their co-trustee under these circumstances, was not merely a constructive but an actual breach of trust, being a positive violation of that clause in the will, which directs the removal of trustees in such cases. The circumstance that George Holland and the other trustees derived no benefit from the conduct of their co-trustee is immaterial, their acquiescence in his acts being sufficient to make them responsible: *Brice v. Stokes* (a), *Adair v. Shaw* (b), *Caffrey v. Darby* (c). [Alderson, B.—It appears that Edward Hunnings in the account of 1819, charges himself with a balance of 326*l.* 14*s.* With this balance, John Holland, jun., in the

(a) 11 Ves. 319.

(b) 1 Sch. & L. 243.

(c) 6 Ves. 438.

following year charges himself. Therefore it should seem that John Holland, jun., became responsible for it. In the next year, 1821, the account is taken in by William Holland; and he, in stating his account, leaves himself a debtor to the estate in the sum of 470*l.* 18*s.* 3*d.* That includes the sum which William Holland must have left in Hunning's hands. How is that a breach of trust in George Holland? The trustees were all equally liable. The breach of trust was acquiesced in by the others, although William Holland was the principal party concerned. That being so, George Holland is separately liable for the consequences: *Ex parte Angle* (a), *Walker v. Symonds* (b). In a case like the present, it is not necessary that all the parties implicated should be before the Court. The party wronged may recover against the less guilty, who may afterwards proceed against the more guilty.

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Mr. *Simpkinson* and Mr. *Koe*, for the defendants.—Admitting that in former times the charity was improperly administered, and the funds wrongly applied, what has that to do with the present case? The information contains no charge of misapplication of the present funds, except with regard to George Holland. The argument for the plaintiff is, that because former trustees have irregularly dealt with the charity, therefore it is to be put to the enormous expense of a scheme to be approved of by the Master from time to time. But how is the Master to act as judge in such a case? If a party comes before the trustees, claiming as a relation of the founder, is that to be dealt with before the Master? The scheme is not proposed in order to dispose of a lumping sum, but to regulate annual rents and profits. By the terms of the will, the trustees are to judge whether the parties apply-

(a) Barnard, 452.

(b) 3 Swanst. 75.

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ing are proper objects. The testator expressly says, that such persons are to partake of the charity "as can make it appear before my trustees" that they are entitled. *Cui bono*, then, direct a scheme? It is only in the case of charities which urgently require regulation, that a scheme is necessary; and unless it appears that trustees have exercised their judgment improperly, the Court will not interfere. In *Waldo v. Caley* (a), where a fund was directed by the testator to be applied by his widow to charitable purposes generally, the distribution to be at her discretion, with the advice and assistance, though not under the controul, of the trustees of the will, Sir *William Grant* declined to direct any scheme for the charity, and decided that the disposition of the fund was at the absolute discretion of the widow. That decision was confirmed by Lord *Eldon* on appeal, and approved of and acted upon by Sir *John Leach* in *Horde v. Earl of Suffolk* (b). [*Al-derson*, B.—In those cases, there was a temporary interest in the party who was to distribute: here, there is a permanent trust throughout all time. Your better line of argument is, that the will itself containing a scheme, it is unnecessary for the Court to direct one. On the other hand, the question is, whether a scheme is not desirable, for the purpose of defining what sort of persons come within the description of "gentlemen."] Whatever advantage might arise from a scheme, if the prayer of the information is founded on a wrong statement of facts, the plaintiff can have no relief; he must stand or fall by his own information. Now, the only allegation in the information which points to a scheme is that which states a difficulty in procuring, in the county of Lincoln, proper objects of charity. That allegation, however, has been met by the answer, and there is no other upon which the relief sought for can be granted. In *Attorney-General v. Grocers' Com-*

(a) 16 Ves. 206.

(b) 2 M. & K. 59.

pamy (a), an information which had been framed improperly, in the same respect as the present, was dismissed with costs, although it was a case in which some relief might have been granted, if it had been properly brought before the Court. As to that part of the information which seeks to have the legal estate recovered, if this were at all necessary, the proper proceeding would be by petition in a summary way, and not by information or bill (b).

Then comes the question as to the alleged breach of trust in the sale of the 200*l.* stock. Upon this point, your Lordship is called upon to say that George Holland, who knew nothing of the sale till afterwards, and who took no benefit from it, is alone to be made liable. Even if this information had been filed at an earlier period, and all the proper parties had been brought before the Court, it is quite clear that the mere circumstance of his being a trustee at the time the sale took place, would not be sufficient to charge him with this sum of money. [*Alderson*, B.—It must be wilful negligence on his part.] They have shewn, from his answer, no wilful negligence. [*Alderson*, B.—He becomes acquainted with the fact in 1819, but takes no steps till 1820.] By the testator's will, the acting trustee was to account to the succeeding; and therefore the trustee who, on taking that account, adopted the breach of trust, was the party liable. In the case in *Barnadiston*, the trustees had actually received the money. It was not a liability in consequence of not taking steps, but for money received. Besides, the correctness of the report of that case is very questionable, for it is difficult to see how Lord *Hardwicke* could have decided the point on petition. In *Walker v. Symonds*, the parties representing the deceased trustee were actually before the Court, and therefore what Lord *Eldon* is reported to have said as

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(a) 1 Keen, 506.

(b) See 11 *Geo.* 4 & 1 *Will.* 4, c. 60, s. 23.

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to charging trustees separately for a breach of trust committed by their co-trustees, is only an *obiter dictum*. Assuming the correctness of the report in that case, it is a dictum which has never been followed, and was expressly disapproved of by Sir *John Leach*; and in a late case, Sir *Launcelot Shadwell*, upon a review of all the authorities, came to the conclusion that there was some mistake on this point in the report of *Walker v. Symonds*; and that, at all events, the dictum of Lord *Eldon* was not to be acted upon. If it were acted upon in this instance, and George Holland were made liable, how could he obtain contribution from the other trustees? Upon the whole, we submit that there is no evidence that the trustees have violated their duty, but on the contrary, that for many years past the charity has been properly administered; that unless improper management be shewn, the Court will not direct a scheme; and that, at all events, it will not direct any scheme which is not final and conclusive in its nature, so as to prevent any further application to the Court. *Attorney-General v. Haberdashers' Company (a)*.

Mr. *Cooper* in reply.—Admitting that the specific relief sought for by the information is improper, the Court will give the proper relief under the prayer for general relief: *Attorney-General v. Jeanes (b)*, *Attorney-General v. Scott (c)*, *Attorney-General v. Mayor of Stamford (d)*, *Attorney-General v. Foyster (e)*, *Attorney-General v. Whitely (f)*, *Attorney-General v. Brook (g)*. [*Alderson, B.*—The question is not whether the Court will give relief only according to the prayer of the information, but whether if no facts are established as averred, the

(a) 1 Ves. 295.

(b) 1 Atk. 355.

(c) 1 Ves. sen. 413.

(d) 2 Swanst. 599.

(e) 1 Anstr. 116.

(f) 11 Ves. 247.

(g) 18 Ves. 324.

Court will give relief under the prayer for general relief.] In *Attorney General v. St. Paul's School* (a) it was held upon appeal, that the Court could give relief under such circumstances. It is not necessary that the facts should be specified and particularized in the information, but supposing facts are alleged, and there is a failure in the proof of them, yet, if it turn out by accident, and contrary to all expectation, that the charity requires to be regulated, relief will be given. It is said, that in *Attorney-General v. Grocers' Company*, the information was dismissed, because the facts as averred were not proved; but the Court could do no otherwise than dismiss the information, because the defendants insisted on a decree of the Commissioners of Sewers, and the Master of the Rolls had no jurisdiction to vary the decree: *Rockley v. Kelly* (b). It may be admitted, that if upon a bill filed, you seek to fix the defendants with the loss of a particular sum of money, or with particular misconduct, you ought to put that fact in issue, and if necessary to amend your bill. But, in the case of an information, it is not necessary to amend for the purpose of stating circumstances which in a bill ought to be introduced by amendments; more especially where the circumstances only tend to shew generally the necessity for a scheme. This observation extends to cases where the defendants might be taken by surprise; but, in a case like the present, they cannot be taken by surprise. The allegations, that improper persons have been made objects of the charity, and that a scheme would be beneficial, are quite sufficient to sustain this information. Suppose even the pleadings contained nothing more than a statement of the devise, and of the alteration in the value of money, it is submitted that the Court, upon proof of those matters alone, would make a decree. The case of *Morden College* (c) in which

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(a) Not reported.

(b) Pre. Cha. 111.

(c) *Attorney-General v. Lubbock*,
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the charity was established for the benefit of decayed Turkish merchants, shews how far the alteration in the value of money will weigh with the Court in increasing the allowances to the objects of the charity. [*Alderson, B.*—In that case there was a definite body to be provided for. Is there any case where there being an indefinite number of objects but a definite allowance, the Court of Chancery has ordered the surplus funds to be applied in increasing the allowances?] In the case just cited, the number of the objects was indefinite. The charity was founded under the will of Sir John Morden for the benefit of so many poor merchants as the rents of his estates would maintain. By the will, each poor merchant was to have 20*l.*, but that sum was reduced by the codicil to 15*l.* The trustees had the power of framing statutes, and were also visitors, and had the whole of the internal management. In addition to the general powers given to them by the will, they obtained an act of Parliament (a) enabling them to increase the allowance to 40*l.* per annum. The income of the charity having, of late years, considerably increased, the trustees thought it desirable to increase the number of objects, and for that purpose they proposed to add a wing to the college. They contended they had authority to do that under the will and the act of Parliament. The question came before the Master of the Rolls who directed a reference to the Master not to approve of a scheme generally, but to inquire whether it was fit and proper to increase the allowances. The Master, amongst many other things, reported that, in his opinion, the allowance to each merchant should be increased to 60*l.* per annum, rather than there should be any increase in the number of objects; and his report was confirmed. The trustees, however, being dissatisfied with the Master's report in other particulars, appealed to the Lord Chancellor,

(a) 11 *Geo. 3, c. 10, s. 96.*

when his Lordship, in considering this particular part of the case, observed that he only differed from the Master of the Rolls in this,—that, looking at the whole state of the case, and the change of laws and circumstances, he thought full justice could not be done unless there were a general scheme. The case, however, afterwards stood over, in order, if possible, to obtain the consent of the trustees to some private arrangement.

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ALDERSON, B.—This was an information filed against the defendants, who are the trustees of a charity in the county of Lincoln, originally founded by the will of Edward Hunstone, in the year 1655.

Dec. 21st.

The information, after setting out the will of the founder, proceeds—first, to charge the defendants with mismanagement of the charity estate in various particulars, to which it is not necessary that I should now advert; secondly, with having suffered the legal estate in the premises to be outstanding; and, thirdly, with mismanagement of the charity generally; and it charges one of the defendants, Edward Holland in particular, with a breach of trust in respect of a sum of money, amounting to upwards of 150*l.* lost to the charity, by the failure of one of the existing trustees of the name of Hunnings.

The information prays, that George Holland may be directed to repay this money; and that the Court will direct the matter to be referred to the Master, to consider of a scheme for the future management of the charity, together with such relief as may be proper under all the circumstances.

The first charge was given up; it appearing quite clear on the evidence that the charity estate had been managed greatly to the advantage of the charity. And as to the mismanagement of the charity itself, there is nothing before the Court to support that allegation against the

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present trustees. They appear to me to have conducted themselves with great propriety, and, so far as the evidence goes, to have appointed proper objects to receive the bounty of the founder.

I see no reason to charge Mr. Holland with any breach of trust as to the money lost by the failure of Hunnings. The utmost that could be urged against him was, that he was not so prompt as he might have been to compel Hunnings to replace the money arising from the stock sold out. But it is clear, that as soon as he became the acting trustee in rotation, the money, as much at least as could be recovered, was replaced; and that Hunnings previously had been considered a man in perfectly good credit. If any complaint could fairly be made at all, it would apply to the trustee who preceded George Holland in office, and who is no party to the present record.

On the whole, I am quite satisfied that all these which are the most important charges against the defendants have totally failed. But then it is, I think, made out that the legal estate is outstanding, and that some inconvenience may possibly result to the charity if that were suffered to continue; though, I own, I think the inconvenience is not likely to be very great, since no instance of it has occurred from the time of the death of the original trustees (which must have taken place more than a century ago), to the present day.

But there is another circumstance in this case. The information prays a reference to the Master to consider of a scheme for the future management of this charity.

It appears that, by the will of Mr. Hunstone, he directed his charity to be for the benefit of such decayed gentlemen as can make it appear unto his trustees that they are of his name and family, and of the age of forty years; or else so impotent as not to be otherwise able to get a living. Such persons as these (and they are afterwards

extended on failure of his own family, to the families of Godney of Bagenderby, Smith of Saltflete, and Wordliff of Toft Grange, successively ; and, lastly, on failure of all these, to such persons being inhabitants of the county of Lincoln at large), are to have each an allowance of 10*l.* a year for life, in case of good conduct. And the number is to depend on the amount to be derived from the estate.

Now, from the evidence, it clearly appears that the estate has increased from an annual rental of about 50*l.* to that of 500*l.* ; and it is obvious, that the amount mentioned in the will, 10*l.*, although at that time a decent allowance for a decayed gentleman, is now, from the change in the value of money, a totally inadequate sum for that purpose ; and that the retaining the present amount, will, in truth, violate the spirit, whilst it is an adherence to the letter of the will.

It appears, moreover, that in former times, though not of late, an improper interpretation has been given to the word "impotent" in the will, which seems to have been construed so as to allow the admission of minors, until they attained their majority, to the benefits of the charity. This interpretation is clearly erroneous, and was admitted to be so. The word "gentlemen" also, is a word of somewhat vague meaning ; and it will be well, therefore, to give some more accurate description of it ; at all events enumerating some classes, so as to make the objects of the charity more definite, and the duties of the trustees more easy in future.

Although, therefore, I am not insensible to the argument which was urged, as to the expense of a scheme, yet, I think on the whole, it would clearly be more for the benefit of the charity that a reference to the Master should take place.

The case of *Morden College*, before Lord *Cottenham*,

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is an authority for my doing this. But neither this, nor the getting in the legal estate, required the present information to be filed, containing grave charges which turn out to be wholly without foundation. Both these objects might have been obtained by petition.

I propose, therefore, to adopt the decree, which, under very similar circumstances, Lord *Langdale* made in *The Attorney-General v. Cullum* (a), "Thinking," as he said in that case, "that the suit has been instituted and conducted in a manner to create a great deal of unnecessary expense, I think it right to frame my decree in terms to save the charity estate from costs to which I think it ought not to be subjected."

I dismiss, with costs, so much of the information as relates to the mismanagement of the estate and of the charity, by the present trustees, and of the breach of trust alleged against George Holland.

I direct a reference to the Master as to the legal estate, to inquire whether it be outstanding, and to take proper measures for getting it in. I direct a reference to him to consider a scheme for the future management of the charity, in which, amongst other things, he is to consider whether the amount paid to each of the objects of the charity should not be increased, and their number diminished, without, however, disturbing any of the present possessors. The Master is also to consider the expediency of increasing the number of the trustees by introducing one or two of the incumbents mentioned in the testator's will, and the propriety of prohibiting, in future, the election of trustees in the same family. He will also consider how to define the word "gentleman" more clearly—as, for instance, by stating that magistrates, esquires, members of the three learned professions, gra-

(a) 1 Keen, 118.

duates of the universities, attornies, surgeons, apothecaries, and the like shall be considered, if otherwise eligible, objects of this charity. He will also define the age at which eligibility is to begin, so as to exclude minors in future. I mention these circumstances as some of those which are proper to be considered. Upon the exclusion of minors, and upon the not disturbing the present trustees, and the present objects of the charity, I wish to be considered as giving a direction to the Master.

And as to the costs of the parts of the information not dismissed, I give none to the relators up to the present time.

The defendant's extra costs as to the parts dismissed, and their own costs up to the present time, they are to have out of the charity estates. The subsequent costs I reserve, intimating, however, my wish that the Master (if there be any improper delay or vexatious proceeding before him, which, however, I do not anticipate,) will report the same, for my government as to the award of these costs on further directions.

Decree accordingly.

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Testatrix devised the residue of her real and personal estate to W. S., his heirs, executors, and administrators, according to the different natures and qualities thereof, upon the trusts following, that is to say, upon trust to retain and keep the same in the state it should be in at the time of her decease as long as he should think proper, or to sell and dispose of the whole, or such part thereof as and when he or they should from time to time think expedient, either by public auction or private contract, to any person or persons

who should be willing to become the purchaser or purchasers; and then upon trust to invest the money to be produced by such sale or sales, together with all ready monies of the testatrix, in his or their own name or names, and in that of two of the residuary legatees thereafter named, in the public funds, or upon real or government securities; and then the testatrix directed that the said W. S., his heirs, executors, or administrators, should stand possessed of and interested in all such the general residue of her real and personal estate, and from and after such sale, then of the stocks, funds, and securities whereon the same or any part thereof should have been invested, in trust, out of the rents, issues, and profits, interest, dividends, and proceeds thereof, to pay several life annuities; and from and after full payment and satisfaction thereof, the testatrix directed that the said W. S., his heirs, executors, and administrators, should stand possessed of all the said residue of her said real and personal estate and effects, and of the stocks, funds, and securities whereon the same or any part thereof should have been invested, and the rents, issues, and profits, interest, dividends, and produce thereof, in trust for five of the said annuitants, (including the said W. S.), in equal shares and proportions, as tenants in common, and for their respective heirs, executors, administrators, and assigns, according to the different natures and qualities thereof:—*Held*, that, upon the terms of this will, it was not the intention of the testatrix that the property should be converted out and out, but that W. S. had a discretion to sell the whole or any part of it when and as he might think expedient, and that until he exercised that discretion the property must be considered to remain in the state it was in at the time of the death of the testatrix.

A trustee having discretion to sell the trust property submitted to a decree for sale in a suit instituted in relation to the trust:—*Held*, that the Court was not therefore bound to carry the sale into execution.

SALOME TURST, spinster, being seised and possessed of considerable real and personal estates, amongst which were an estate in fee simple in the greater part and a long term of years in the remaining part of the Pantheon in Oxford Street, by her will, dated in September, 1803, after bequeathing various legacies, devised and bequeathed as follows:—"And as to all the rest, residue, and remainder of my real and personal estate, whatsoever and wheresoever, after payment of my debts, the above mentioned legacies, my funeral expenses, and the charges of proving this my will, I give, devise, and bequeath the same unto and to the use of William Seymour, of Margaret Street, in the parish of Marylebone, and county of Middlesex, gentleman, his heirs, executors, and administrators, for ever, according to the different natures and qualities thereof respectively; upon the several trusts nevertheless, and for the several ends, intents, and purposes hereinafter expressed and declared of and concerning the same; that is to say, upon trust to retain and keep the same in the state it shall be in at the time of my de-

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cease as long as he shall think proper, or to sell and dispose of the whole or such part thereof as and when he or they shall from time to time think expedient, either by public auction or private contract, and in such lots and parcels as he or they shall think best and most advisable, unto any person or persons who shall be willing to become the purchaser or purchasers thereof, or of any part thereof, for the most money and best price or prices that can or may, at the time or times of such sale or sales, or disposition, be reasonably had or gotten for the same; and then upon trust to place out and invest the money to arise and be produced from or by such sale or sales, together with all ready money which I shall leave at the time of my decease, and all sum and sums of money which shall be collected or got in by him or them, and which shall be due and owing to me at the time of my decease, in his or their own name or names, and in the name of some two of the residuary legatees hereinafter named, in the public stocks or funds, or upon real or government securities in Great Britain, at interest. And then I will and direct that the said William Seymour, his heirs, executors, or administrators, shall and do stand and be possessed of and interested in all such the general residue of my real and personal estate, and from and after any such sale, then of the stocks, funds, or securities whereon the same or any part thereof shall have been laid out or invested, in trust, by and out of the rents, issues, and profits, interest, dividends, and proceeds thereof, to pay the several annuities following; that is to say," [Then followed several life annuities to William Polley, Mary Polley, his daughter, Sarah Crode, Rebecca Harvey, the said William Seymour, and several other persons.] " And from and after full and entire payment and satisfaction of the several annuities, and all arrears thereof, then I will and direct that the said William Seymour, his heirs, executors, and administrators, shall stand possessed of all the said rest residue and remainder

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of my said real and personal estate and effects, and of the stocks, funds, and securities whereon the same or any part thereof shall have been invested, and the rents, issues, and profits, interest, dividends, and produce thereof, in trust for the said William Polley, Mary Polley, his daughter, Sarah Crode, Rebecca Harvey, and himself the said William Seymour, in equal shares and proportions, as tenants in common, and not as joint tenants, and for their respective heirs, executors, administrators, and assigns, according to the different natures and qualities." The testatrix then, for promoting and facilitating such sale and sales as were by her therein-before authorized to be made of her real and personal estate, declared that the receipt and receipts of the said William Seymour, his heirs, executors, and administrators, should, from time to time, be a good and sufficient discharge, and good and sufficient discharges, to the purchaser or purchasers thereof, or of any part thereof respectively, for so much money as in such receipt or receipts should be acknowledged, or expressed to be received, &c.; and that it should be lawful for the said William Seymour, his executors and administrators, when, and as he should from time to time see proper, to alter, change, and transfer any funds or securities which should be purchased or taken in pursuance of her will, to any other funds or securities of the same or a similar nature, in his name, and the names of some two of such residuary legatees. The testatrix then provided, that if, at any time or times after her decease, the rents, issues, and profits, interest, dividends, and annual produce of the said general residue of her estates and effects, or of the stocks, funds, and securities whereon the same or any part thereof should have been laid out or invested, should not extend to or be sufficient to answer and pay all the said annuities in full, then, and in such case, and so often as the same should prove insufficient, all and every the said annuities or yearly sums therein-before by her directed to be paid, should

abate proportionably one with the other. And the testatrix nominated and appointed the said William Seymour sole executor of her will.

The testatrix died in March, 1805, leaving the several annuitants, except Sarah Crode, surviving her. Sarah Crode died in the lifetime of the testatrix, leaving no heirs. William Seymour proved the will, and entered into possession of the real and personal estate of the testatrix.

The original bill was filed in 1820, by William Polley and the other annuitants, against Seymour and the Attorney General, praying the usual accounts and payment of their annuities, and that the real estates might be sold. The cause came on for hearing, and various proceedings were had in the suit. In June, 1832, an order was made for the sale of the real and leasehold estates. These were accordingly, on several occasions, offered for sale, but for various sufficient reasons the sales could not be proceeded with. The property was then let upon a repairing lease for sixty-one years, from Lady-day, 1834, at a rent of 800*l*. The Master having, under these circumstances, reported that a sale would not be beneficial to the parties, an order was made in July, 1837, that the surplus rents, after payment of costs, should be applied in liquidation of the annuities.

During the progress of the suit considerable changes had taken place, by death or marriage, in regard to the parties. Of these changes, which were provided for by bills of revivor and supplement, it is only necessary to notice that which took place by the death of William Polley, intestate, in December, 1830. He left a widow and several children surviving him, amongst whom was William Polley, one of the present plaintiffs, his heir-at-law and personal representative.

The principal question now to be decided on further directions was, whether, consistently with the will of the testatrix, the property could be permitted to remain as real property, in which case William Polley and the other

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plaintiffs, as heirs of the residuary devisees, would be entitled to so much of it as was freehold, or whether the testatrix intended that this property should be converted out and out into personalty, in which case the next of kin or legatees of the residuary devisees would be entitled.

Mr. *Stuart* and Mr. *Bellasis* for the plaintiffs.—The first question is whether, when this suit was first instituted, the residuary property devised by the will was to be deemed real estate, or to have been converted out and out into personalty; and, secondly, whether, if it were not then converted, the subsequent proceedings in the suit make any difference in that respect. Upon the first point, it is clear, that where a testator devises real property to be sold and converted into money, and the money to be paid to a particular individual, there is a conversion out and out. The party who takes under such a gift takes it as personal estate, on the principle that there is impressed on it by the testator the character of personal estate. But though the direction be to convert the property out and out, and to give it to the individual as money, yet the individual dying before the conversion takes place, may exercise a right of election, and may demonstrate his intention, by will or otherwise, that the property shall go to his real and not his personal representatives. If, however, he makes no such election, then, in order to entitle his personal representative to take it as personalty, he must shew that, by the terms of the will, the real property was converted out and out. Now, he cannot shew that, if the will merely gives the trustee an option to lay the money out on land. [*Alderson*, B.—The other parties will contend that the option given to the trustee in this case is only as to time; and that the conversion must take place some time or other.] Here, the discretion given to the trustee extends over the whole period of his life. He is to retain and keep the property in the state in which it may be found at the tes-

tator's death, "as long as he shall think proper." There is no where, on the face of this will, an imperative direction given to him to convert the property at some specific time. [*Alderson*, B.—The trustee is to retain and keep the property so long as *he* shall think proper; but the property is to be sold when he or *his representatives* may think proper. In *Thornton v. Hawley* (a) the option was given to the representatives of certain persons, as well as to the persons themselves, and Sir *William Grant* relied on that circumstance as shewing that the option was only as to time. You may suppose a person to leave to an individual whom he knows, and on whose sagacity he depends, a particular sort of option, but you cannot extend that to his representatives.] *Thornton v. Hawley* was the case of a settlement. [*Alderson*, B.—Suppose the property had been devised to a trustee upon trust, to convert it into personal estate as soon as he should find it convenient, would not that be a conversion out and out?] It might be so; but whether a limited or unlimited time is given to the trustee, is not absolutely material in this case. Suppose the time to be limited; we represent the heir of Polley, who was the first person to take the property, whether converted or unconverted. Polley is dead, and the conversion has not yet taken place; why then, should the Court be called upon to say that the property, which was real at the time of his death, passed to his personal representative and not to his heir? Besides, here, by the terms of the will, the trustee is to stand possessed in trust for the "respective heirs" as well as executors of the parties named. It is only in cases like that of *Kennell v. Abbott* (b), where the testator's declarations are of the most clear and explicit nature, that the Court will declare a conversion out and out. If the conversion was intended for a particular purpose, and that

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(a) 10 Ves. 138.

(b) 4 Ves. 802.

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purpose fail, the Court says there is no conversion at all: *Ackroyd v. Smithson* (a). In *Walker v. Denne* (b) the money was not laid out, and it was sought to compel the trustees to take the gift as if it had been laid out; but the Court decided against the conversion of the property, on the ground that a discretion was vested in the trustee. The Court always leans towards keeping the property in the state in which it is found. [*Alderson*, B.—It is entirely a question of construction. If the property is left to the trustee to convert at any time he pleases, (which he would have a right to do without that direction), then it is a conversion out and out.] Upon the second point it seems unnecessary to contend, that the proceedings which have taken place in this suit cannot affect the general question.

Mr. *Turner* for the defendant W. Seymour.—The question which may possibly arise between Seymour and the crown, relative to the interest of Sarah Crode, who has died without heirs, need not now be argued. It will be time enough to advert to that point, which depends on the case of *Burgess v. Wheate* (c), when the question of conversion has been decided. The point now to be determined is, whether any option to convert is given to the trustee, the law being clear that if there is an option there cannot be an absolute conversion. Now, by the first part of the residuary clause, the trustee is to retain and keep the property in its original state as long as he shall think proper, or to sell and dispose of the whole or such part thereof as and when he shall think expedient. If the will had stopped there, it could not have been contended that this was a conversion out and out. By that clause the trustee has a clear option to sell or not to sell. [*Alderson*, B.—If the words had

(a) 1 Bro. C. C. 503.

(b) 2 Ves. 170.

(c) 1 W. Bl. 123; 1 Eden. 177.

been "if" he shall think proper, there would have been a clear option; but the words are "as long" as he shall think proper. Has he any discretion given him except as to time? Does the absolute discretion you contend for extend to the personalty, as, for instance, books, jewels, &c.] The trustee had, by this clause, an absolute discretion to sell the entire property, although, probably, the testatrix might intend that he should keep the personalty in its original state. The power of sale gives him a complete option to sell the whole or part. That option is not affected by any of the subsequent clauses. The words "upon trust to place out and invest, &c." do not imply a necessity of selling the whole; they only refer to an investment of such part as might be sold: and the clause in which the testatrix refers to the sales therein-before "authorized," shews clearly that she did not intend that a sale should take place at all events. How, then, can the Court say that there is an absolute direction to sell out and out, when, in no part of the will, is any expression of that sort to be found? The result is, that an absolute discretion to sell being given to the trustee, if that discretion be not exercised, the parties interested must take the fund as they find it. In *Cole v. Wade* (a), a discretion having been vested in trustees, both as to the conversion and distribution of the fund comprised in the testator's will, and the trustees having omitted to exercise that discretion, the Court exercised it so far as to declare who were the parties entitled to take, namely, the testator's next of kin; but it was held by Lord Eldon, in *Walter v. Maunde* (b), which was an appeal from part of the decree in *Cole v. Wade*, that such part of the fund as consisted of real estate, should be distributed amongst the next of kin as real estate, so as to descend to their heirs-at-law. "The question," said his Lordship, "is, whether, if the

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(a) 16 Ves. 27.

(b) 19 Ves. 424.

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testator has given both his real and personal estates to trustees, with a direction to distribute them in such manner and proportions, and subject to such annuities and mortgages as they may think proper, it follows, that, as they could convert or forbear to convert, this Court is therefore to say, it will distribute the whole as personal property, as that is more convenient, though not the mode of distribution directed. The effect of all the cases is this: that the will, if it is to be construed as giving to the next of kin the real estate, gives it as real estate; the devisees taking the property in the quality in which they receive it, and, where there is both real and personal estate, taking each, transmissible as such." In the present case, therefore, it being impossible to assign any limit to the trustee's discretion, and the ultimate limitations in the will giving the property to the parties both as real and personal, they must take it as it is. The principle on which this result is founded is apparent in other legal proceedings. Upon a sale of estates under a bankruptcy, the property paying twenty shillings in the pound, and the bankrupt being dead, a question arises as to the disposal of the surplus; and the decree is, that so much of the real property as was converted in the lifetime of the bankrupt is personal, and so much as was converted after his death is real: *Banks v. Scott* (a). So upon a mortgage with a power of sale reserving the residue to the mortgagor, his executors, and administrators, if the sale takes place in the lifetime of the mortgagor the surplus is personal estate, if after his death, it is real estate: *Wright v. Rose* (b). The general principle is, that where an option of sale and conversion is given to a third person, it depends on the exercise or non-exercise of that option, or on the period at which it is exercised, what are the rights of the parties claiming the benefit of the sale.

(a) 5 Mad. 493.

(b) 2 S. & S. 323.

Upon the question how far the trustee's discretion has been affected by the proceedings in this suit, the case of *Jessopp v. Watson* (a), is in point. There the Master had reported against the sale of the real estate; yet it was not considered that that report in any way affected the question of conversion; on the contrary, the Court ultimately held that the real estate descended to the heir as personalty. It is clear, therefore, that Seymour, by submitting to the order in this cause, has not renounced the option which has been given to him by the testatrix. It may be admitted that this is a trust which ought to be looked at with jealousy; and, perhaps, the Court may determine this case upon that view of the subject. It is not, however, for the Court to control the exercise of discretion by a trustee who had the confidence of the testatrix, unless any thing which appears in the cause gives strong reason for altering that discretion.

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Mr. *Wray*, for the Crown.—The option here given to the trustee was only as to the time and occasion of selling; he has not an arbitrary power given him to deal with the property as he pleases. In a case in which leaseholds had been bequeathed to trustees with power to renew, and the trustees having neglected to renew, rested their justification on the discretion which had been given them by the will, Sir *John Leach* held that they were bound to exercise a sound and not a capricious discretion on the subject. The decree of discretion is to be measured with reference to the purpose, and perhaps with reference to the property concerned.

Mr. *Temple* and Mr. *H. E. Sharpe*, for the legatees and personal representatives of some of the residuary devisees.—It is not disputed that where the option of converting

(a) 1 M. & K. 670.

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property is left to the personal discretion of the trustee, if he does not exercise that option, the Court will not exercise it for him; but this is not that case. No one can read the will, and say that Seymour has the right to continue the property as real estate, and that it depends on his will and pleasure whether it shall be converted into personalty or not. The testatrix only meant to say, that as there were circumstances affecting its value with reference to the time of sale, she left the time of sale to the trustee's discretion. If she had not done so, the property must have been sold immediately; the rule being, that where lands are devised to be sold, and the money divided among several persons, none of them can elect to take the land instead of money, if one desires a sale: *Deeth v. Hale* (a).

It is said, however, that the trustee had a complete discretion to sell or not to sell. The question now raised has often been discussed. In *Walker v. Denne* (b), the trustee had an option to constitute the property either real or personal. He was to lay out the money either in freehold or leasehold lands. It did not appear that this option, which was strictly a personal authority, had ever been exercised, either one way or the other. The time arrived at which something was to be done, and the Court said, that as there was nothing to shew that if the option had been exercised, the property would have been made realty, it must remain as it was. That case likewise turned upon other points, which were alone sufficient to support the decision. No doubt, where the purpose for which the testator directs the sale fails altogether, the property results to the heir-at-law as realty; but where the purpose only partially fails, there, notwithstanding express words of option given by the will, the conversion must take place. *Cole v. Wade* (c) was, upon the terms of the will, a case of

(a) 2 Molloy, 317.

(b) 2 Ves. 170.

(c) 16 Ves. 27.

absolute option. There was no occasion, for any thing that appeared on the will, for the trustee to sell at all; yet the object of the testator having only partially failed, the Court directed a sale. The Court, in these cases, acts upon the principle of convenience stated by Sir *John Leach* in *Smith v. Claxton* (a), namely, that where the obvious purpose is that there should be a sale for convenience of division amongst the devisees, there, unless that purpose entirely fail, a sale must take place. Here, the purpose of the testator was to divide the property, when sold, amongst a number of individuals; and although one has died, and his share has consequently lapsed, the other parties are entitled. The purposes of the testator have only partially failed, and the case comes within the principle laid down by Sir *John Leach*. *Wright v. Wright* (b), *Doughty v. Bull* (c), *Fletcher v. Ashburner* (d), *Kirkman v. Miles* (e). Another circumstance is, that the Court has already decided in what state the property ought to be, by making the order for sale of 1831. If the property had been actually sold, the present discussion could not have arisen; and will the mere circumstance that the vendor could not make a good title affect the ultimate judgment of the Court? [*Alderson*, B.—The sale by the Court, if it had taken place, would have been a sale by the trustee. Suppose there was an imperfect attempt at a sale, was it any thing more than an imperfect attempt by the trustee himself? You use the authority of the Court as construing the will itself, but you do not know that it was before the Court.] At all events, *Kirkman v. Miles*, and other cases, are authorities to shew that, *primâ facie*, the property in these cases is to be declared in the state in which it ought to be, and not in the state in which it

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(a) 4 Madd. 484.

(b) 16 Ves. 188.

(c) 2 P. W. 320.

(d) 1 Bro. C. C. 497.

(e) 13 Ves. 338.

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was at the time of the testator's death. At this moment, in order to do what the testatrix intended, the property should be converted; and your Lordship is called upon to hold it vested, as it ought to be, for the purposes of the will. It is clear that she could not have intended to give the trustee the unreasonable power contended for on the other side. If such was her intention, she should have expressed it in unequivocal terms. She could not have intended to give him power to say, that a part only of the individuals named in the will should have the benefit of it. On the ground of hardship alone, it is almost conclusive that she could not mean this.

Mr. *Stuart*, in reply.—The plaintiff does not rely merely on the discretion given to the trustee to sell or not to sell: the testatrix gives him a general power of control over the whole estate, using apt words of disposition, as well for the property unsold, as for that which is sold. To deprive the plaintiff of his right as heir-at-law of Polley, the character of personal estate must be absolutely and decisively impressed upon the property. He contends that it is not so, and that the trustee had, by the terms of this will, discretion either to sell part or all of the estate, or to retain part of it or not, as he might think convenient, when the rights of the parties happened to accrue. *Cowley v. Hartstonge* (a). It is not necessary to enter into the question whether the trustee has waived his option, by submitting to the order for sale, because the plaintiff's ancestor died before that period.

Dec. 21st.

ALDERSON, B.—In this case I have looked at the authorities, and examined with care the will of the testatrix, Salome Turst. The only question is, whether the Pantheon, which is of freehold tenure, and the other pro-

(a) 1 Dow. 361.

perty mentioned in her will, must be considered as converted into personal estate by the residuary clause.

The principles on which the court is to proceed are quite clear. We are to examine the whole will, and to see whether the expressed intention of the testatrix to be collected therefrom was, that this property should be converted out and out, as it is called; or whether it was given to the trustee upon a trust, either to sell or not to sell, according as he in his discretion might judge best.

The testatrix, after giving some trifling legacies, included all her residuary property, real and personal, in one general devise. She devises it to a trustee in trust to keep, &c. Now on looking at this clause, it is to be observed that the simple and natural meaning of the words is in favour of a discretion vested in the trustee. For he is—first, to keep and retain the estate in the state it shall be in at her decease; secondly, if he does not do that, he is to sell the whole, or any part thereof (which seems strongly to point to a discretionary power) as he shall think expedient, and when he shall think expedient, in such lots as he shall think best. The will then provides that the proceeds of what is sold, together with the personalty, shall be vested in the trustee's name, jointly with those of two of the residuary legatees, and gives the trustee the power of changing the stocks in which the money should be invested; but still confining such power to stocks of a similar description. The will then—after providing that out of the fund, (consisting both of the rents of so much of the property as should remain actually unconverted and the then annual profits of the personal estate and parts of the real estates converted), certain annuities should be paid, which, in case of insufficiency, were to abate proportionally—gives the whole residuary fund to certain persons, amongst whom the trustee is included, in equal shares. This clause contains words applicable both to the

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property in its converted and unconverted state, and speaks of the "respective heirs" as well as the personal representatives of the residuary legatees—in fact, directing that the residuary property in the hands of the trustees shall go to them, their heirs or executors, according to the different natures and qualities thereof. This, therefore, very materially increases the probability of the conclusion that the testatrix intended the trustee to have a discretion, for she seems here to contemplate the probability that he would use it, and to have employed apt words to provide for such a contingency. There is an additional expression in the will which leads to the same result. The testatrix, speaking of the trust, uses these words: "And for facilitating such sale and sales as are by me hereinbefore authorized to be made of my real and personal estate," &c. The word "authorized" is more applicable to a discretionary power than to an order and direction on her part.

There are difficulties, no doubt, on the other side, but they rather arise out of the nature of the devise being of portions of one general residuary fund, consisting both of real and personal estate, and of the double situation of Mr. Seymour as trustee and one of the legatees, than out of the words of the will, as used by the testatrix. It is safer in such cases to be governed by the words of the will, and, if possible, to give to each and to all of them their natural and simple meaning. Indeed, I think that the decision of Sir William Grant in *Brown v. Bigg* (a), on words not very dissimilar, is in point on the present occasion. There the testator ordered and empowered his wife, in case she chose so to do, with the advice of W. R., to sell the Gransden estates, stating that she would probably not desire to live there. It was contended that this amounted to a conversion out and out; but Sir

(a) 7 Ves. 279.

William Grant held the contrary, deciding that the property only became personal estate upon the sale by the widow under the powers contained in the will. That is the view I take of this will. It seems to me, that here the testatrix has bequeathed her real estate to the trustee, with a discretion to sell or not to sell the whole or any part of it ; and, consequently, that until he exercises that discretion, the property remains in the state it was at the time of her death.

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Then, have the subsequent proceedings in this court made any difference? In 1820, the bill was filed. The trustee then submitted to act as directed by the Court. After various references, the Court directed a sale, but no such sale has taken place; and the last report of the Master is against any sale, it being in his judgment expedient for all parties, that the property should remain in its present state. I think this leaves the case as it stood under the will.

Decree accordingly.

DOMVILLE & BERRINGTON.

Nov. 18th.

THIS was a suit of foreclosure, and the estate had been sold before the Master in lots.

Biddings ordered to be opened on an advance of 365*l.* on 7,300*l.*; but a mortgagee of the estate, on whose application the order was made, not allowed to conduct the sale.

Mr. Coleridge, on behalf of the mortgagee, now moved to open the biddings for one of the lots, and that the mortgagee might be at liberty to bid at the sale. He stated that the lot had been sold for 7,300*l.*, and that the proposed advance was 365*l.*, being 5*l.* per cent. upon the original purchase money. He likewise submitted, that as the lot had been purchased by a person who was under an incapacity to buy, namely, the solicitor of one of the parties, the sale was thereby vacated, and this was consequently a motion of course. *See Adams v. Langer. 10 B. 10.*

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Mr. *Whitworth*, for the purchaser, said, that the proposed advance was not sufficient to authorize the Court to open the biddings: *Garstone v. Edwards* (a). Besides, the mortgagee ought to have obtained leave to bid in the first instance, and if the Court now allowed him to open the biddings, he ought, at all events, not to have the conduct of the sale.

Mr. *Girdlestone*, for a subsequent incumbrancer, made no objection to the biddings being opened, but objected to the mortgagee having the conduct of the sale, inasmuch as he had no interest in making the most of the estate for the rest of the creditors.

Mr. *Stinton*, for other parties.

Mr. *Coleridge*, in reply, said, that the sale being before the Master, was a sufficient protection to the creditors. Upon the objection as to the amount of the proposed advance, he cited *Lawrence v. Halliday* (b).

THE LORD CHIEF BARON.—The estate having been sold the mortgagee now comes here for a re-sale, and for leave to bid. In opposition to this it is said that he ought not to be both buyer and seller. I think there is reason in that; for his interest as mortgagee is safe, although the estate may not fetch more than a certain sum. Therefore, let the biddings be opened, but let the Master direct how the sale should be conducted, and by what solicitor.

Order accordingly.

(a) 1 Sim. & Stu. 20.

(b) 6 Sim. 296.

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HALL v. CLEE.

Nov. 21st.

IN this case it had been referred to the Master to take an account of the titheable matters and things mentioned in the bill, and a commission had issued to examine witnesses for the purpose of taking the account. The defendants had declined to examine witnesses, but a commissioner had been appointed on their behalf to watch the proceedings.

In the Court of Exchequer, commissioners for the examination of witnesses in aid of the proceedings before the Master after decree, are not sworn to secrecy.

A motion was now made on the part of the defendants, that the depositions taken under the commission might be suppressed. The motion was supported by affidavits alleging various acts of impropriety against the commissioners, and stating, amongst other things, that, according to the practice of the Court, the commissioners had not been sworn to secrecy; that the defendants had been misled by their ignorance of the practice in that respect, and that their interest had been greatly prejudiced thereby.

Mr. *Younge*, for the motion, admitted that it is the practice, in the Exchequer, not to swear commissioners to secrecy after a decree, and he referred to *Fowl. Prac.* vol. 2, p. 240, where the form of the commission is given; but he contended against the propriety of the practice.

Mr. *Simpkinson* and Mr. *Bethell* *contrà*, relied on the practice of the Court.

THE LORD CHIEF BARON, in the course of his judgment on the motion said, that, if before the decree had passed or the commission had issued, a motion had been made with a view to alter the practice of the Court in this particular, it might have been ground for making a general order upon the subject; but, under existing circumstances, he could not accede to the application.

Motion refused.

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Dec. 12th.

Where a bill had been filed for the specific performance of an agreement to grant a lease, and for an account of arrears of rent on the footing of the agreement, and the term for which the lease was to be granted had expired before the hearing of the cause:—*Held*, that the plaintiff having a substantial right to relief, was entitled to a decree for an account of the arrears, although, under the circumstances, specific performance of the agreement could not be granted.

WILKINSON, v. TORKINGTON.

IN May, 1828, J. C. Wilkinson, as rector of the united parishes of All Saints and St. Peter's, Stamford, in the county of Lincoln, by means of William Banks, his authorized agent, entered into an agreement in writing with the defendants for a lease to them of all the tithes and compositions for tithes within those parishes, for the term of nine years, commencing from the 5th of April, 1828, at and under the yearly rent of 370*l*. Under this agreement the defendants entered into possession of the tithes, and paid the stipulated rent for several successive years, till it was abated by the deduction of an annual sum of 30*l*. The rent, notwithstanding this deduction, having afterwards become in arrear, Wilkinson, in July, 1834, brought his action upon the agreement against the defendants, to which they pleaded that it was not under seal, and therefore void of law. Wilkinson then, in February, 1836, filed the present bill, praying for a specific performance of the agreement, and for an account and payment of the arrears of rent.

The defendants, by their answer, did not deny that arrears of rent were due, but insisted that, according to the true intent and meaning of the agreement, certain deductions and abatements were to be made to them, which Wilkinson had refused to make. It did not, however, appear upon the face of the agreement, that they had any authority for this statement. They also insisted generally that Wilkinson had no remedy in equity, and was not entitled to have the agreement specifically performed.

In November, 1836, Wilkinson died, having by his will appointed the present plaintiff his sole executor. The suit was revived by the present plaintiff in January, 1837, but the cause did not come on for hearing till the term granted by the agreement had expired.

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Mr. *Simpkinson* and Mr. *Ellison*, for the plaintiffs. The defendants mean to insist, that because the term originally stipulated for under the agreement has expired before the hearing, the Court has no jurisdiction to decree payment of the arrears, or a specific performance of the agreement. It is clear, however, that where the Court would originally have had jurisdiction to decree the specific performance of an agreement, if any portion of it remains unperformed at the hearing, the Court has also jurisdiction to decree what remains unperformed. Even where the original subject-matter has been destroyed by the act of God, the Court has decreed a specific performance: *Cass v. Rudele* (a), *Payne v. Mellor* (b), *Mortimer v. Capper* (c), *Jackson v. Lever* (d). These cases were all cited and commented upon by Sir *John Leach*, in *Kenney v. Wexham* (e). There the annuity, which was the consideration of the contract, had expired, and yet a specific performance of the contract was decreed. The case of *Nesbitt v. Meyer* (f), which will be cited on the other side, is not, when examined, at variance with these authorities. In fact, notwithstanding the language of Sir *Thomas Plumer* in that case, he avoided deciding the express point now in issue.

Mr. *Twiss* and Mr. *Hayter*, for the defendants.—The defendants rely on *Nesbitt v. Meyer* (g), and a series of decisions which have been pronounced in conformity with that case. The authorities which have been cited for the plaintiff are all cases of accident, the loss having been occasioned by fire, earthquake, &c. This is simply a case of efflux of time. The original plaintiff should have come here earlier, knowing as he did the extent of his lease,

(a) 2 Vern. 280.

(b) 6 Ves. 349.

(c) 1 Bro. C. C. 156.

(d) 3 Bro. C. C. 604.

(e) 6 Madd. 355.

(f) 1 Swanst. 223.

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It is said that the point now raised was not specifically decided by Sir *Thomas Plumer*. Admitting that to be so, the language of his Honour is sufficiently explicit, and he refers to a case of *Weston v. Pimm* (a), where it was held clearly that in a suit instituted for the specific execution of an agreement to grant a lease, the determination of the term before the hearing was a bar to the relief. [Alderson, B.—In that case the party put an end to the agreement before he brought his bill. How then could he afterwards ask for the specific performance of it?] In *Hoyle v. Livesey* (b), the Master of the Rolls advanced a cause out of its turn in order to prevent such a result. That shews that he thought the objection tenable. [Alderson, B.—That must have been done *pro majori cautela*, though I cannot see how the delay of the Court should operate in such a case. The moment the bill is filed the rights of the parties remain fixed, or ought so to do. I cannot accede to the doctrine in *Nesbitt v. Meyer*. How can the constitution of the Court alter the rights of the parties?] The term having expired, the only grounds for coming into a court of equity are at an end. The plaintiff's right is already as complete at law, as the decree of a court of equity could make it. He had originally no absolute and abstract right in equity, but only a right to have his absolute right enforced at law. He has no right of that sort now, but he still has his remedy by *assumpsit*. Besides, independently of all other considerations, the plaintiff omitted to use due diligence in his application to the extraordinary jurisdiction of the Court. The time which elapsed between the agreement and the filing of the bill is in itself sufficient ground for refusing this relief: *Watson v. Reid* (c), *Heath v. Henley* (d). [Alderson, B.—It is laid down in *Crofton v.*

(a) 1 Swanst. 225; 3 Ves. & B.
197.

(b) 1 Mer. 381.

(c) 1 Russ. & M. 236.

(d) 1 Ca. Ch. 20.

Ormsby (a), that resting on a mere equitable title does not make a party guilty of laches, so as to bar him of relief.] The party here has his remedy at law.

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Mr. *Simpkinson*, in reply, was stopped by the Court.

ALDERSON, B.—It appears to me that the plaintiff is entitled to a decree. The question is, whether, at the time this suit was commenced, the original plaintiff had a substantial right to have the agreement specifically performed; and, if he had, whether the consequences arising from lapse of time in this case ought to prevent the Court from granting him such part of the relief which he seeks as is capable of being granted. The cases which have been cited on behalf of the defendants are distinguishable from the present. In *Weston v. Pimm* the party, by his own act, deprived the Court of the possibility of granting him substantial relief, and the Court therefore held that it would be nugatory to make any decree in his favour. *Nesbitt v. Meyer* may, perhaps, be supported upon similar grounds. Here, when the party came into Court, he came entitled to the specific performance of his agreement for the residus of the term, and to an account on the footing of the agreement. It is true that lapse of time has taken away part of the subject-matter of the agreement, namely, the lease, but not the substantial part, which is the account. Therefore, seeing that the party was entitled to the specific performance of his agreement when he came into Court, and that his subsequent acts and lapse of time have taken away no ground of substantial relief, it appears to me that the plaintiff is entitled to a decree for an account.

Decree accordingly.

(a) 2 Sch. & Lef. 603.

1837.

Dec. 11th.

In a suit instituted by an equitable mortgagee for the enforcement of his security, the mortgagor will be allowed by the decree six months to redeem.

THORPE v. GARTSIDE.

THE bill was filed by certain equitable mortgagees of the estates of John Gartside, deceased, against the trustees, who were also executors, under his will, his heir-at-law, and his younger children, who were interested in his real estates under the will, praying an account and payment of what might be found due under the mortgage securities, or that the estates might be sold. The question was, whether the estates should be sold immediately, or six months should be given to the representatives of the mortgagor to redeem.

Mr. *Simpkinson* and Mr. *Bacon* for the plaintiff, observed that the authorities upon this point were conflicting. In *Bailey v. Gould* (a), and *Pain v. Smith* (b), an immediate sale was decreed. In *Brocklehurst v. Jessop* (c), it did not appear from the report what direction was given upon this head. On the other had, in *Parker v. Housefield* (d), and *Miller v. Woods* (e), six months were given to the mortgagee to redeem. All the authorities go to the extent that if the equitable mortgagee proceeds against the representatives of the mortgagor he is entitled to a sale. The only question is as to the time of sale.

ALDERSON, B.—I think the weight of authority is in favour of giving the six months.

Decree accordingly.

(a) In Excheq., June, 1830.

(b) 2 M. & K. 417.

(c) 7 Sim. 438.

(d) 2 M. & K. 419.

(e) 1 Keen, 16.

1838.

GARNER v. HUGHES. (a)

Dom. Proc.

May 1st, 1838.

THE decree in the case of *Hughes v. Garner*, reported ante p. 328, having been appealed from, upon the appeal coming on for hearing in the House of Lords, the counsel on both sides, on the suggestion of the Lord Chancellor, agreed to an issue to try whether Henry Rumsey Williams did, in July 1815, shew to John Evans the settlement of June, 1795, mentioned in the pleadings, &c. &c., in the words of Williams's depositions.

With an alteration to that effect in the decree, the cause was remitted to the court below.

(a) From Mr. Finnelly's note.

I N D E X

TO THE

PRINCIPAL MATTERS.

ABSTRACT OF TITLE.

See VENDOR AND PURCHASER.

ACCOUNT.

See ARBITRATION, 1.

ATTORNEY AND CLIENT, 4.

MORTGAGOR AND MORTGAGEE,
1, 2, 3.

PLEA AND PLEADING, 3, 4, 5,
6, 7.

1. If A., a merchant in England, guarantee the payment of all purchases made by B., a factor in England, for C., a merchant abroad, subject to the approval of X., an agent of C., A., being simply the paymaster or guarantor for C., can maintain no bill for an account against B., unless he state a case of collusion between B. and X. *Darthez v. Lee*, 5

2. A party who has once admitted an account delivered to be correct, cannot afterwards file a bill to have the account taken in equity upon the mere allegation that he had no means of ascertaining that the account so delivered was correct, without charging specific acts of fraud against the defendant; and it is not necessarily an allegation of fraud to say, that the accounting party agreed to deliver up certain chattels demanded by the other, upon condition of having his

alleged balance admitted and paid.
Ibid.

AFFIDAVIT.

See PRACTICE, 6.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See ARBITRATION.

CONTRACT.

FRAUDULENT CONTRACT.

Where a bill had been filed for the specific performance of an agreement to grant a lease, and for an account of arrears of rent on the footing of the agreement, and the term for which the lease was to be granted had expired before the hearing of the cause:—*Held*, that the plaintiff having a substantial right to relief, was entitled to a decree for an account of the arrears, although, under the circumstances, specific performance of the agreement could not be granted. *Wilkinson v. Torkington*, 726

AMENDED BILL.

See DEMURRER.

AMENDMENT.

See PLEA AND PLEADING, 12, 16, 29.
PRACTICE, 1, 15, 21.

ANNUITY.

See LEGACY AND LEGATEE, 1, 4.
PLEA AND PLEADING, 4.

1. The 54th and 56th sections of stat. 6 Geo. 4, c. 16, are not confined to mere personal obligations by the surety, but are applicable to cases where the property of the surety is assigned as a collateral security for the debt of the principal. *Maber v. Hobbs*, 317

2. Where the whole consideration money is paid to the grantor of an annuity, and out of that money the attorney immediately receives from the grantor the amount of his bill of costs, this is not an illegal retainer within the Annuity Acts. *Ibid.*

ANSWER.

See PLEA AND PLEADING, 1, 14, 18.
PRACTICE, 1, 2, 4, 6, 14.

APPOINTMENT.

See LEGACY AND LEGATEE, 4.
LIEN, 2.

By fine and settlement made after marriage, certain lands, of which the wife was seised in fee before the marriage, were conveyed to her separate use for life, or to the use of such person or persons as she, notwithstanding her coverture, should appoint; with remainder, in default of appointment, in trust for herself for life, or to her two daughters in fee. The wife afterwards joined with her husband in the deposit of the title deeds of the premises, by way of equitable mortgage, for securing the repayment of the husband's debts:—*Held*, that the deed of settlement gave the wife no power of appointing in fee, and that the mortgagee had no claim upon the estate as against the two daughters. *Lenthwaite v. Clarkson*, 372

ASSIGNMENT.

ARBITRATION.

See STATUTE OF LIMITATIONS, 1.

1. Although a court of equity will not in general decree the specific performance of an agreement to refer to arbitration, or, on the death of an arbitrator, substitute the Master for the arbitrator, yet, where matters of account have been referred to arbitration, which fails by the death of the arbitrator, a party who refuses to supply the defect, by naming a new arbitrator, will receive no relief from a court of equity, except upon the terms of his doing equity; and those terms may consist in his consenting to the accounts being taken by the Master. *Cheslyn v. Dalby, et c contra*, 170

2. Where a verdict is taken, subject to the award of an arbitrator as to the amount of the debt, a court of law will, under circumstances, compel the appointment of a fresh arbitrator, but not where the verdict is taken subject to arbitration generally. *Ibid.*

ASSIGNMENT.

A father assigned certain leasehold premises to a trustee, in trust for his son until he should attain the age of 21 years, and in the mean time to stand possessed thereof in trust, to collect and receive the rents and profits thereof, as and when the same should become payable, and thereupon to pay, apply, and dispose of the same for and towards the maintenance, education, clothing, and support of the said son during his minority; and, upon his attaining the age of 21 years, upon trust to assign the said premises, together with the lease and the accumulations of rents, unto the said son, his executors, &c., for the remainder of the term:—*Held*, that the son took a vested interest in the lease, and that, upon his death

ATTORNEY AND CLIENT.

under 21, it passed to his personal representative. *Stephens v. Frost*, 302

ASSUMPSIT.

See PLEA AND PLEADING, 23.

ATTACHMENT.

See PRACTICE.

ATTORNEY.

See ATTORNEY AND CLIENT.

SCANDAL AND IMPERTINENCE, 2, 3.

ATTORNEY AND CLIENT.

See MORTGAGOR AND MORTGAGEE, 3.

1. C. for many years employed D. as his attorney, and in the course of those years became largely indebted to D. for business done and money lent. From time to time D. delivered accounts to C., but received no payments of any considerable amount from his client. C. afterwards employed other attorneys. Ultimately, C. being threatened with an execution by a judgment creditor, applied to D. for his assistance, who procured the money for him by way of mortgage, but stipulated that the mortgage should stand as a security for his own debt, as well as the judgment debt. C. having assented to this arrangement, executed the mortgage deed, and also a deed of trust of even date, which was prepared jointly by D. and the other attorneys of C., by which it was agreed that the mortgage should stand as a security for the amount of D.'s debt, to be settled by arbitration, and that in such settlement no prejudices should arise to D. by reason of the lapse of time:—*Held*, that this transaction did not amount to the receiving of a gratuity by an attorney from his client, and consequently, in the absence of any fraud, was sustainable in a court of equity. *Cheslyn v. Dalby*,

170

BANK OF ENGLAND. 735

2. A security which has been given to an attorney by his client for a debt really due, or as a reward for services already rendered, will not be set aside in equity. *Ibid.*

3. Agreements entered into between an attorney and his client for the purchase by the attorney, at an under price, of estates to which the client had good title, but of which he was not in possession, set aside for fraud and maintenance. *Jones v. Thomas*, 498

4. Where an account is decreed to be taken of the dealings and transactions between an attorney and his client, in the course of which the attorney has taken securities from the client, the attorney must not only prove the securities, but likewise the consideration for which they were given. Therefore, where a promissory note was given by the client to his attorney under circumstances of great suspicion, but the client was unable, for want of witnesses, to prove fraud in the attorney, the Court, upon decreeing an account between the parties, directed an inquiry as to whether the attorney could by any, and what, affirmative evidence, prove the consideration for the note. *Ibid.*

AUCTIONEER.

See PRACTICE, 9.

BANK OF ENGLAND.

See DISTINGUISH.

1. S. made a specific bequest of the dividends of certain stock to W. and his wife for their lives; the principal after the decease of the survivor of them, to go to such of their children as should attain 21; and, in default of such children, to sink into the residue. Upon the death of the testatrix, the various bequests of the will were appropriated to the respective legatees, and W. re-

736 BILL OF DISCOVERY.

gularly received his dividends, the principal stock still standing in the name of the testatrix. Afterwards, the wife of W. died leaving one child by W. In consequence of this event, the executrix of S., colluding with W. and other interested parties, applied to the Bank of England to have part of the stock transferred to the residuary legatee, upon the representation that there was no child of W. The Bank consented to transfer, but took a bond of indemnity, containing recitals, from which it appeared that they had notice of the will, and of the appropriation of the legacies. The stock in question was transferred to the residuary legatee, and ultimately sold out:—*Held*, that the Bank were not liable for the misapplication of the stock. *Humberstone v. Chase*, 209

2. The Bank stands in relation to stock as a depository of goods in relation to the goods. The Bank, therefore, can only be made responsible for a transfer of stock after distinct notice given to them of an existing claim upon the stock. *Ibid*.

3. Although the Bank are bound to allow the transfer to or by the executor of stock specifically bequeathed, if the executor has not assented to the legacy, yet it does not follow that, if he has assented to the legacy, the Bank are bound to transfer it to the legatee. *Ibid*.

BARON AND FEME.

See HUSBAND AND WIFE.

BIDDINGS.

See OPENING BIDDINGS.

VENDOR AND PURCHASER, 7.

BILL.

See DEMURRER.

PLEA AND PLEADING.
PRACTICE.

BILL OF DISCOVERY.

See PRACTICE.

CHARITY.

BILL OF EXCHANGE.

See PLEA AND PLEADING, 14.

BREACH OF TRUST.

See CHARITY, 1, 2, 3.

TRUSTEE, 4.

BUBBLE.

See FRAUDULENT CONTRACT.

CANAL COMPANY.

See CONSTRUCTION OF ACT OF PARLIAMENT.

CHARITY.

1. Testator devised an estate to trustees and their successors, upon trust that all such decayed gentlemen as could make it appear to the trustees that they were of the testator's name and family, and of the age of 40 years, or else so impotent as not otherwise able to get a living, should be allowed out of the yearly rents and profits of the lands 10*l.* each by the year for their lives, so far as the rents would extend. At the time of making the will the annual rental of the estate was about 50*l.*, but at the time of filing the information it amounted to about 500*l.*:—*Held*, that this was a proper case for a scheme for the future management of the charity; and that in preparing such a scheme the Master was to consider of the expediency of increasing the allowance and diminishing the number of the future objects of the charity, and also to define more accurately what class of persons (excluding all minors) the testator intended to benefit. *Attorney-General v. Holland*, 683

2. Where, upon an information filed for the administration of a charity estate, the case proved by the relators was sufficient to induce the Court to direct a scheme, and to order the legal estate in the charity lands to be

CHURCHWARDENS.

got in, but the information contained false charges against the existing trustees of culpable mismanagement and breaches of trust, the Court dismissed the latter part of the information, with costs, and gave the relators no costs up to the hearing as to that part of the information which was not dismissed. *Ibid.*

3. *Semble*, that where the relief obtained on an information relative to a charity might have been obtained on petition, the Court will give no costs to the relators up to the hearing. *Ibid.*

4. A., B., C., and D., were co-trustees of a charity under a will, which directed that one trustee in rotation should be the acting trustee for the current year, and keep the accounts. A. being the acting trustee in a particular year, without the knowledge of the other trustees, applied some of the charity funds to his own use. At the expiration of the year A. delivered his accounts to B., who succeeded him as acting trustee, and at the expiration of that year B. delivered his accounts to C., who succeeded him in like manner:—*Held*, that D. was not answerable for the breach of trust committed by A. *Ibid.*

CHELSEA WATERWORKS.

See PERSONAL ESTATE.

CHOSE IN ACTION.

See HUSBAND AND WIFE.

CHURCHWARDENS.

1. Under the stat. 59 Geo. 3, c. 12, lands belonging to the parish are vested in the churchwardens and overseers of the parish, as a corporation. Therefore, where feoffees to charitable uses were empowered to sell and convey their lands to the commissioners under an improvement act:—

CONSTRUCTION OF ACT. 737

Held, that the petition for the investment of the purchase money should be presented in the names of the churchwardens and overseers of the parish in which the charity was established. *Ex parte Annesley*, 350

2. *Semble*, that churchwardens and overseers, having no corporate seal, have no power to execute a power of Attorney, authorising a party to continue to receive the dividends of stock, notwithstanding fluctuations in the number and identity of the members of the corporation. *Ibid.*

CLERK IN COURT.

See LIEN, 1.

PRACTICE, 20.

COMMISSION TO EXAMINE WITNESSES.

See PRACTICE, 18.

CONFIRMATION.

See INFANT, 2.

CONSTRUCTION OF ACT OF PARLIAMENT.

1. The undertakers of the Aire and Calder Navigation were empowered by act of Parliament to make a canal and a tram-road leading therefrom, and fifteen years were given to them to complete the works. At the expiration of nearly four years from the passing of the act, having completed part of the canal, and having marked out the tram-road, they gave notice, pursuant to the act, to the owners of a certain spot of land, of their intention to purchase it for the purposes of the tram-road. The land owners resisted the purchase, on the ground that the undertakers had deviated from the parliamentary line in the construction of the canal:—*Held*, that as the deviation worked no injury to the objectors, and as the undertakers did not admit any intention to abandon the original line, and

there remained ten years in which they might complete their works, this objection was untenable. *Lee v. Milner*, 611

2. Acts of Parliament for making canals, rail-roads, &c., are powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed. Each proprietor, therefore, has a right to have the power strictly and literally carried into effect as regards his own lands, and also a right to require that no variation shall be made to his prejudice elsewhere. But where the act of Parliament is faithfully carried into execution as regards his lands, he cannot, on the mere ground of a variation elsewhere which is not injurious to himself, and which was made with the consent of others, obtain from a court of equity an injunction to stay the proceedings. *Ibid.*

CONTEMPT.

See PRACTICE, 422.

1. Defendant in contempt, living within the rules of the King's Bench, ordered to be committed to the Fleet. *Anonymous*, 144

2. Where a defendant had been in contempt for want of an answer, through the mistake of the Warden of the Fleet in refusing to take the answer, the Court ordered that the costs of the contempt should be costs in the cause; and, on failure of the plaintiff to take exceptions to the answer within a limited time, that the defendant should be discharged. *Reymer v. Gunstone*, 584

CONVERSION.

See PERSONAL ESTATE.
TRUSTEE.

COPYHOLD.

See CUSTOM OF MANOR.

Semble, that copyholds are not

CREDITORS' SUIT.

within the provisions of stat. 59 Geo. 3, c. 12, *Anon.* 352, n.

CORPORATION.

See CHURCHWARDENS.

COSTS.

See CHARITY, 2, 3.

CONTEMPT, 2.

DISTRINGAS.

LIEN, 1.

PRACTICE, 5, 7.

SCANDAL AND IMPERTINENCE, 1, 2, 3.

Where, under the provisions of a railway act, lands are purchased by the company, of corporations, tenants for life, &c., the costs of an application to the Court to have the purchase money applied in the discharge of incumbrances, will be directed to be paid by the company, although the act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to *the like uses*. *Ex parte Trafford*, 522

COUNSEL.

See PRACTICE, 1.

PRODUCTION OF DEEDS AND PAPERS, 4.

COURT ROLLS.

See PRODUCTION OF DEEDS AND DOCUMENTS.

CREDITORS' SUIT.

See DEBTOR AND CREDITOR.

Where lands had been purchased under a decree in a creditors' suit, the Court, on the application of a creditor who had for four years acquiesced in the purchase, and who was not supported in his objections by the other creditors, refused to set aside the purchase on the ground of misdescription of the land in the particulars of sale. *Price v. North*, 620

CROSS BILL.

See PRACTICE, 22.

CUSTOM OF MANOR.

Quere, whether it is a good and reasonable custom that upon the death of a tenant in possession of lands holden of a manor for lives, the next life in reversion for which the estate is holden shall be entitled to enjoy the estate; and if such custom be good and reasonable, whether, where a party takes a grant of such lands for the life of himself and his grand nephews and dies, the grant shall operate as an advancement for the grand nephews, so as to rebut a resulting trust in favour of other parties claiming under the purchaser. *Edwards v. Edwards*, 123

DEBTOR AND CREDITOR.

See PRINCIPAL AND AGENT, 1, 2.

PRINCIPAL AND SURETY.

1. Every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint and several; therefore, were four persons had opened a joint account with certain bankers, who had advanced to them money on such joint account:—*Held*, that upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or shewing that the latter were unable to pay by reason of their insolvency. *Thorpe v. Jackson*, 553

2. But to a bill filed by joint creditors for the purpose of obtaining relief against the assets of a deceased partner or joint contractor, the surviving partners or joint contractors must be made parties, though no decree is sought against them; such persons being necessarily interested in taking the accounts. *Ibid.*

3. Upon a bill filed by a judgment-creditor one day before the stat. 3 & 4 Will. 4, c. 27 came into operation, to obtain the benefit of a judgment entered up and docketed twenty-eight years ago, since which time it did not appear that the creditor had taken any steps to enforce payment of his demand:—*Held*, that the plaintiff was barred of all equitable relief by lapse of time alone, independently of the question, whether satisfaction of the judgment could or could not be presumed. *Grenfell v. Girdlestone*, 662

4. Upon a bill filed by a creditor to enforce a judgment of twenty-eight years' standing, the plaintiff, in order to rebut the presumption that the judgment had been satisfied, gave evidence of the insolvency of his debtor during the greater part of that period:—*Held*, that such evidence would not avail the plaintiff against the unexplained fact of his not having sooner attempted to enforce the judgment, and that to obtain relief in equity, he was bound, under the circumstances, to shew to demonstration that the judgment had not been satisfied. *Ibid.*

DECLARATION.

See CONSTRUCTION OF ACT.

DECREE IN CHANCERY.

See PRACTICE, 3, 17.

DEMONSTRATIVE LEGACY.

See LEGACY AND LEGATEE, 1.

DEEDS AND DOCUMENTS.

See LIEN.

PRODUCTION OF DEEDS AND DOCUMENTS.

DEMURRER.

See PLEA & PLEADING, 3, 16, 21, 29.

Demurrer, under circumstances, al-

740 EXAMIN. OF WITNESSES.

lowed to amended bill, after answer to original bill. *Stephens v. Frost*, 302

DEVISE.

See WILL.

DISABLING STATUTES.

See TITHES.

DISCOVERY.

See GAMING TRANSACTION, 1, 2.
PLEA AND PLEADING, 12.

DIMISSAL OF BILL.

See PRACTICE, 3, 4, 17, 21.

DISTRINGAS.

Distringas obtained in this Court, followed by proceedings in the Court of Chancery, discharged with costs. *Williams v. The Bank of England*, 265

ELECTION.

See LEGACY AND LEGATEE, 11.

ENROLMENT OF DECREE.

See PRACTICE, 11.

EVIDENCE.

See PLEA AND PLEADING, 18.
PRACTICE, 6, 19.
REHEARING, 1.
TITHES, 4.

The circumstance that property situate on the sea-shore, between a sea-side town and the sea, has not been assessed to the poor's rates of the parish in which the town is situate, is very slender evidence of the property not being within the parish. *Perrott v. Bryant*, 61

EXAMINATION OF WITNESSES.

See PRACTICE, 18.

GAMING TRANSACTION.

EXAMINER.

See SCANDAL AND IMPERTINENCE, 3.

EXCEPTIONS.

See PRACTICE, 13.

EXECUTOR.

See LEGACY AND LEGATEE.
PLEA AND PLEADING, 19, 20.
TRUSTEE.

EXHIBIT.

See PRACTICE, 19.
REHEARING, 1.

FRAUD.

See ACCOUNT, 1, 2.

FRAUDULENT CONTRACT.

See ATTORNEY AND CLIENT.
PATENT, 1.

1. Agreement for the purchase of part of the profits of a patent, which turned out to be a mere bubble, set aside as having been obtained by fraud and misrepresentation, and so much of the purchase money as had been paid under the agreement ordered to be repaid. *Lovell v. Hicks*, 46

GAMING TRANSACTION.

1. Upon an action brought to recover a sum of money lent upon the security of an I. O. U., and upon a bill filed to discover whether the money had not been lent for the purpose of gaming:—*Held*, that the defendant was bound to state by his answer whether it was so lent; it being still a question open to argument in a court of law, whether money lent at play, or for the purposes of play, is recoverable in an action at law. *Wilkinson v. L'Eaugier*, 366

2. *Quære*, whether money lent for the purpose of gaming is recoverable in an action at law, and whether an

HUSBAND AND WIFE.

J. O. U. is a security within the stat.
9 Anne, c. 14. *Ibid.*

GENERAL ORDERS, 11.

HEIR-AT-LAW.

See WILL.

HUSBAND AND WIFE.

See LIEN, 2.

MARRIAGE SETTLEMENT.

PLEA AND PLEADING, 28.

E. B., a single woman, transferred certain stock, her property, into the joint names of herself and two trustees; and on the day of the transfer, she and the trustees, without reference to any marriage on her part, executed an indenture, by which it was declared that the trustees should hold the property in trust, to pay the dividends to E. B. for her life, for her sole and separate use, independent of any husband whom she might marry; and, after her death, upon such trusts as E. B. should by will, notwithstanding her coverture, appoint; and, in default of such appointment, in trust for E. B., her executors, administrators, and assigns. E. B. afterwards married, and by a deed, reciting the settlement, and executed by her husband and herself, she, by the direction of her husband, assigned the dividends of the stock in trust, for the punctual payment of an annuity granted by the husband:—*Held*, that, whether or not under the deed of settlement the wife had power, as against her husband, to make this assignment, the joining the husband in the deed of assignment was a confirmation of the deed of settlement, and consequently that the assignment by the wife was valid. *Maber v. Hobbs*, 317

2. *Quære*, whether, notwithstanding the case of *Davies v. Thornycroft*, 6 Sim. 420, a trust for the

LACHES.

741

separate use of a single woman is valid against an after-taken husband?

Ibid.

3. A lease of a light-house and the tolls thereof, by the Corporation of Trinity House, is a chattel real, and therefore a husband may assign his wife's interest in such a lease. *Ex parte Ellison*, 528

4. Where an act of parliament authorizes the purchase of lands in which a feme covert is interested, and gives the Court of Exchequer authority to distribute the purchase money amongst the parties beneficially entitled thereto, the exercise of that authority by the Court is in lieu of the solemnities ordinarily required for the conveyance of the real property of a feme covert, or on the payment of her money out of Court. *Ibid.*

INFANT.

1. Upon the administration of the real property of an infant, this Court will not delegate to the Master the power of approving leases of the estates. *Symons v. Symons*, 1

2. Where a party takes a lease of an infant's lands, and the infant, on coming of age, mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease. *Story v. Johnson*, 586

INTEREST.

See LEGACY AND LEGATEE.

MORTGAGOR AND MORTGAGEE.

INJUNCTION.

See PLEA AND PLEADING, 8.
PRACTICE, 5, 13.

INTERROGATORIES.

See PLEA AND PLEADING, 18, 19.
PRACTICE.

LACHES.

See PRACTICE, 14, 18, 23.

LAPSE.

See LEGACY AND LEGATEE, 12.

LEASE.

See INFANT, 2.
PRACTICE, 26.
WILL, 2.

LEGACY AND LEGATEE.

See BANK OF ENGLAND, 1, 3.

1. Testatrix bequeathed an annuity of 100*l.* to her niece for life, and charged the same upon her leasehold property in Wimpole Street, and all and every her residuary personal estate and effects whatsoever, save and except her leasehold premises at R.:—*Held*, that this was a demonstrative legacy. *Livesay v. Redfern*, 90

2. In 1780 the interest of a sum of money was bequeathed to A. for her life, and after her decease the principal to her daughter B. Between 1784 and 1795 proceedings in Chancery, in which A. and B. were parties, were instituted against the executor, and a decree for an account was obtained, which was not acted upon. From that time till 1828, no application was made by B. for her legacy, nor did it appear that A. had of late years received her interest. On the other hand, it was stated by the representatives of the executor, and from circumstances it appeared probable, that the legacy was paid by the executor many years ago to A. and B. jointly, or to one of them with the consent of the other:—*Held*, nevertheless, that payment of the legacy in the mode suggested could not be presumed, such mode of payment being contrary to the presumed duty of an executor:—*Held*, also, that A. not dying till 1830, B.'s claim was not barred by the Statute of Limitations. *Prior v. Horniblow*, 200

3. A residue bequeathed by will is

clearly within the provisions of the stat. 3 & 4 Will. 4, c. 27, s. 40. *Ibid.*

4. Testator devised a mixed fund of real and personal property to a trustee, upon trust to pay the rents, issues, and profits to certain persons, (amongst whom was his daughter M.), for their respective lives, and subject to those trusts he gave M. power to appoint by will the whole property. M. married, and, by a will executed in pursuance of the power, devised the whole fund to a trustee, upon trust to permit her husband to receive and take the rents, issues, and profits for his life, subject as thereafter mentioned; and in case she should leave any issue of the marriage, son or daughter, living at her decease, she charged the estate with 4,000*l.* for the benefit of that son or daughter; and after the decease of her husband she devised the whole fund to such son or daughter absolutely; she then proceeded as follows:—"And in case there shall be no issue of my marriage living at my decease, then I give, devise, and bequeath to my said dear husband all and singular my said estates and effects, to hold to him, his heirs, executors, &c., subject nevertheless and chargeable with the payment of 100*l.* to each of his sisters, A., B., C., and D. Also, I give and bequeath to E. the sum of 200*l.*, to be paid to her within twelve calendar months next after my decease:"—*Held*, that E.'s legacy was a charge upon the real estate over which M. exercised her power of appointment. *Nyssen v. Gretton*, 222

5. The circumstance that a mixed fund of real and personal estate is devised to the executor is not alone sufficient to make pecuniary legacies a charge upon the real estate. *Ibid.*

6. Testator devised to J. M. for his life "one annuity or clear yearly sum of 100*l.*," and charged his estates at C. with the payment of the annuity.

He then devised the estates at C. to trustees, in trust to levy and raise the annuity and pay the same to J. M.; and subject thereto, and all costs, charges, and expenses attending the raising and paying the same, in trust for A. for life, with remainder to B. in fee:—*Held*, that J. M. was entitled to the annuity clear of all deductions for legacy duty. *Gude v. Mumford*, 448

7. The question whether a legatee is to take his legacy free from legacy duty, depends upon the intention of the testator as manifested upon the face of the will. Therefore, the words "without deduction," "clear of all deductions," &c., may be sufficient to free the legacy from duty, although there be, from the nature of the property on which it is charged, other outgoings to which those words may be applied. *Ibid.*

8. Testatrix gave several legacies, and directed her husband, whom she appointed her executor, to pay the legacies as soon after her death as might be convenient, or within three years, if it should suit his convenience: *Held*, that the legatees were not entitled to interest on their legacies before the expiration of the three years. *Thomas v. The Attorney-General*, 525

9. Where lands are charged by will with the payment of debts and legacies, and the executor has power to raise money for that purpose by the sale or mortgage of all or any of the testator's real estates, this is not a discretion which can be exercised arbitrarily or capriciously by the executor. *Ibid.*

10. Testator directed his trustees to apply a legacy to the support and maintenance of the wife of his son H., and for the support and education of his children born in wedlock. There were no children of H. at the testator's death:—*Held*, that the wife took the legacy absolutely to her separate use. *Cape v. Cape*, 543

11. Testatrix bequeathed a legacy

to A., which she declared should be taken in satisfaction of all claims which A. then had or might have upon the estate after her decease. At the time of making the will, A. had a claim upon the testatrix for a legacy under the will of I. S.:—*Held*, that parol evidence was not admissible to shew that this was the only claim which A. ever had upon the testatrix, and consequently that A. was not compellable to elect between the benefit of the will of the testatrix and that of J. S. *Dixon v. Samson*, 566

12. Legacy charged on real estate, and payable on the brother and sister of the legatee attaining the age of 21, held not to have lapsed by the death of the legatee, before the time of payment; the payment being postponed for the convenience of the estate, and not as a condition annexed to the person of the legatee. *Goulbourn v. Brooks*, 539

LEGACY DUTY.

See LEGACY AND LEGATEE.

LETTER OF ATTORNEY.

See CHURCHWARDEN.

LIEN.

See MORTGAGOR AND MORTGAGEE, 4, 5.

1. A clerk in court has a lien upon the fund in Court, and also upon the decree and other documents in the cause, in respect of his fees and disbursements. *Potter v. Hyatt*, 112

2. A wife in *extremis*, and having just been delivered of a child, appointed by will real property to her husband, in fee. After her death, the husband gave his bond for securing 3000*l.* to the infant; which bond recited that he had upon the execution of the will given his wife an assurance that he would make provision for the child:—*Held*, that the 3000*l.* was a lien on the estate. *Ex parte Atkins*, 536

MAINTENANCE.

See WILL.

MANOR.

See CUSTOM OF MANOR.
PRODUCTION OF DEEDS.

MARRIAGE SETTLEMENT.

See VENDOR AND PURCHASER.

W. J., by a settlement made upon his first marriage, covenanted that, upon the death of his intended wife, he would provide a portion of 100*l.* to be paid to the children of the marriage in equal shares, upon their severally attaining twenty-one, with interest in the mean time for their maintenance. The marriage took effect, and the wife died in the lifetime of W. J., leaving seven children. W. J. married again, and, by a deed made in contemplation of that marriage, he conveyed land to trustees, upon trust after his death, or in his lifetime, if he should consent, to raise 600*l.* in trust for the six younger children of his first marriage, to be divided between them in equal shares, such shares to be vested in them at twenty-one. The children attained their ages of twenty-one, and received their portions under the second settlement:—*Held*, that those portions were in satisfaction of the provision made for them by the first settlement. *Jones v. Morgan*, 403

MEMORANDA, 1, 462, 528.

MISTAKE.

See CONTEMPT, 2.—WILL, 1.

In cases of mistake, the time of limitation, which by analogy to that prescribed by the 21 Jac. 1, c. 16, is held to bar the remedy in Courts of equity, begins to run from the time of the discovery of the mistake. *Brooks-bank v. Smith*, 58

MODUS.

Where occupiers file a bill against

a party to establish a modus, pending a suit instituted against them by the same party for the tithes, it is not necessary for them, in support of their bill, to have the defendant's admission of their occupation. *Fisher v. Arlett*, 208

MORTGAGOR AND MORTGAGEE.

See APPOINTMENT.

PLEA AND PLEADING, 26.

1. Where the interest due upon a mortgage had become in arrear, and in the mortgagee's account of arrears rests were made from time to time, on which interest was calculated, and ultimately a general account of all arrears, calculated on the footing of those rests, was signed by the mortgagor and confirmed by a deed, executed by him three years afterwards, for securing repayment of the balance to the mortgagee:—*Held*, that these transactions were not usurious, and that the mortgagor was liable for the balance. *Blackburn v. Warwick*, 32

2. On a bill for redemption of mortgaged property in the possession of the mortgagee, the latter will be made to account for all loss and damage occasioned by his gross negligence in respect of bad cultivation and non-repair of the mortgaged premises. *Wragg v. Denham*, 117

3. Where an attorney had taken a mortgage from his client for his bill of costs in preparing that and another mortgage, and the client, before the attorney's mortgage was executed, assented to the bill, but afterwards, on coming to redeem, questioned its accuracy, the Court directed the Master to examine the bill with a view to ascertain the reasonableness of the charges, without entering into evidence as to whether the business charged for had been actually done. *Ib.*

4. A. and B. were directors in the W. M. Waterworks Company, in which

no shareholder can act as a director without holding ten shares. A. and B. being intimate friends, the latter advanced to the former several sums of money. The last of these advances was made on the 23rd July, 1829, on which day A. delivered to B. an order upon the secretary of the company to transfer A.'s ten shares into B.'s name. B. did not at that time make use of the order, and A. continued to act as director until his death, in May, 1832. A.'s affairs being insolvent, and a suit having been instituted for the administration of his assets, B. then served the order of transfer on the secretary, and presented his petition in the suit, claiming an equitable lien on A.'s ten shares for the amount of his advances, with interest:—*Held*, that these circumstances were not sufficient to shew an intention to create a lien on the shares; and, consequently, B.'s claim was rejected. *Cumming v. Prescott*, 488

5. Mortgagee of shares in a company must give notice of his incumbance to the secretary, or his lien will be lost, as against a subsequent purchaser for valuable consideration without notice. *Ibid.*

6. Where the qualification of a party to act as a director of a company consists in his being the proprietor of a certain number of shares, the qualification will not be lost by a mortgage of those shares. *Ibid.*

7. In a suit instituted by an equitable mortgagee for the enforcement of his security, the mortgagor will be allowed by the decree six months to redeem. *Thorpe v. Gartside*, 730

NOTICE.

See PLEA AND PLEADING, 17, 26, 27.
VENDOR AND PURCHASER, 2, 3.

OPENING BIDDINGS.

See VENDOR AND PURCHASER, 7.

Biddings ordered to be opened on

an advance of 365*l.* on 7,300*l.*; but a mortgagee of the estate, on whose application the order was made, not allowed to conduct the sale. *Domville v. Berrington*, 723

OVERSEER.

See CHURCHWARDEN.

OYSTERS.

See TITHES, 1, 2.

PARISH.

See EVIDENCE.

PARTIES.

See DEBTOR AND CREDITOR, 2.

PLEA AND PLEADING.

TITHES, 1.

PARTITION.

1. Where one of several tenants in common has conveyed away his share of the estate, in distinct portions, to different individuals, upon a bill subsequently filed for a partition of the whole estate, the Court, in making its decree, will have regard not merely to the legal rights of the original tenants in common, but to the equitable rights of all parties actually interested in the estate; it will, therefore, carry the object of the bill into effect, by directing a distinct partition of each of the several portions of the estate in which the alienees of the *quondam* tenant in common respectively have an interest. Therefore, where A., B., and C. were tenants in common, in undivided thirds, of an estate comprising Blackacre and Whiteacre, and C. conveyed his interest in Blackacre to D., and his interest in Whiteacre to E.; upon a bill filed by A. and B., for a partition of the whole estate, the Court (reversing a former decree, which had sanctioned a different mode of partition) directed that Blackacre should be divided into three parts, and each part should be conveyed to A., B.

and D. respectively; and that White-acre should be divided into three parts, and each part should be conveyed to A. B., and E. respectively.

Story v. Johnson, 586

2. A court of equity, in decreeing a partition, does not act ministerially, and in obedience to the call of those parties who have a right to the partition, but founds itself upon the general jurisdiction given to courts of equity. It will, therefore, on a bill of partition, adjust the equitable rights of all the parties interested in the estate; and will, for that purpose, give special instructions to the commissioners of partition, and even, in cases of necessity, nominate the commissioners. *Ibid.*

3. A court of equity, in decreeing partition, will have regard to the provisions of the statute 8 & 9 Will. 3, c. 31, s. 3. *Ibid.*

4. Tenant for life, with remainder to A., B. and C., as tenants in common in fee, granted a lease of the estate to D. for twenty-one years, which lease was confirmed by A. and C.:—*Held*, that the lease was good against A. and C., and that B. could not impeach it in a suit for partition in which he was co-plaintiff with A. *Ibid.*

PARTNERSHIP.

See ACCOUNT, 1, 2.

DEBTOR AND CREDITOR, 1, 2.

PATENT.

PERSONAL ESTATE, 2.

PLEA AND PLEADING, 5, 10, 12, 24.

VENDOR AND PURCHASER, 1.

1. Declaration, that real estate, held for partnership purposes, is in the nature of personal estate. *Morris v. Kearsley*, 139

2. A partner, resident in England, of a house carrying on business abroad, is not bound to set forth a schedule of books, &c., relating to and in the custody of the foreign house. *Martineau v. Cox*, 638

PLEA AND PLEADING.

PATENT.

See FRAUDULENT CONTRACT.

1. Joint owners of a patent for a particular process used in carrying on a trade, are answerable *in solido* for the losses occasioned in relation to the patent by the frauds of their co-adventurers. *Lovell v. Hicks*, 481

PERSONAL ESTATE.

1. The shares in the Chelsea Waterworks Company are personal property, and will therefore pass by a will not executed according to the provisions of the Statute of Frauds. *Bligh v. Brent*, 268

2. Real property, held for the purposes of a trading company, is, in equity, to be deemed in the nature of personal estate, although the company is a corporation, and the shares are assignable, and one shareholder is not answerable for the acts of another in relation to the partnership concern. *Ibid.*

PLEA AND PLEADING.

See CHURCHWARDEN.

DEBTOR AND CREDITOR, 1, 2, 3, 4.

GAMING TRANSACTION, 1, 2.

MODUS.

PARTITION, 4A

PRACTICE, 12.

1. The words "knowledge, information, remembrance, and belief," if stated at the commencement of an answer as applying to the whole, will govern the whole answer. *Neate v. Duke of Marlborough*, 3

2. If a bill state a fact, not denied by the answer, by which it appears that the defendant has the means of making an inquiry, he must answer as to the result of his inquiry, *Ibid.*

3. A bill brought for a discovery and for an injunction to restrain proceedings at law, cannot be demurred to on the mere ground that the plaintiffs in equity are not all defendants at law. *Darthez v. Lee*, 12

4. A bill for an account of the

rents and profits received by the grantee of an annuity in possession of the premises demised to secure the annuity, must contain an offer by the plaintiff, either to redeem in the terms of the deed, or to repurchase upon equitable terms, to be settled by the Court. *Knebell v. White*, 15

5. A bill for an account of partnership transactions must pray for a dissolution of the co-partnership. *Ibid.*

6. Generally, a bill for an account need not contain an offer by the plaintiff to pay the balance if found against him. *Ibid.*

7. Upon a bill for an account, evidence to shew on which side the balance lies cannot be used at the hearing. *Ibid.*

8. In a suit for tithes instituted by a rector against a party who was both patron of the rectory and lord of the manor in which the land for which the tithes claimed were situate, suggesting that a customary payment of 40*l.* per annum, alleged by the defendant to have been made from time immemorial in lieu of all tithes, were founded on a series of corrupt contracts by way of resignation bonds and otherwise, between successive patrons and rectors:—*Held*, upon a supplemental bill of discovery filed by the rector, that the defendant was bound to produce all such private documents in his custody relating to the matters inquired after by the bill as did not constitute his title to the inheritance of the manor, or of the lands of which the tithes were claimed, or the inheritance of the tithes. *Knight v. Marquis of Waterford*, 22

9. The plaintiff is not bound by the defendant's construction of documents in his possession (not his title deeds), if it be clear from the circumstances that they may relate to the plaintiff's title. *Ibid.*

10. A suit having been instituted by a company of proprietors of iron-works to set aside the contract under

which they had purchased the iron-works of the defendant, and the decree having directed an inquiry as to the net profits made by the company:—*Held*, that it was competent for the defendant, who had not been in possession for some years, to exhibit interrogatories before the Master, for the purpose of ascertaining in what manner the Company had managed the concern, without setting forth any specific statement of facts. *Small v. Attwood*, 101

11. Upon a bill of discovery in aid of a defence to an action on a bill of exchange, if the defendant in equity is interrogated as to the consideration given for the bill, he must answer not only as to the consideration which he gave for the bill himself, but as to that which he knows another party to have given. *Lord Glengall v. Edwards*, 125

12. Policies of insurance having been effected by a certain firm on goods alleged to have been purchased and shipped by them in September, 1829, and an action having been brought on those policies, the underwriters filed a bill of discovery against the firm, alleging that no such purchase had been made; and afterwards obtained an order to amend their bill, upon a suggestion, supported by affidavit, that the firm had not sufficient capital to make the purchase:—*Held*, that such permission to amend did not authorize the underwriters to introduce into their bill inquiries as to the general solvency of the firm, or as to its dealings and transactions from the commencement of the partnership in 1827. *Janson v. Solarte*, 132

13. The underwriter has a right to the most extensive discovery relative to the particular transaction which is impeached, but the Court will interpose to prevent him from making general inquisitorial inquiries. *Ibid.*

14. The bill charged that the defendants had given no consideration for a certain bill of exchange, of

which they were the holders, but that they were mere *trustees* of it for the plaintiffs; and so it would appear if the defendants would discover and set forth the circumstances under which, and the consideration for which, the bill was endorsed to them. The defendants answered the particular charges as to the circumstances, consideration, &c., but omitted to answer the general charge as to their being trustees:—*Held*, that the answer was insufficient. *Culverhouse v. Alexander*, 218

15. A party who files his bill to obtain the benefit of an interest accruing by intestacy, must not only make the personal representative of the intestate a party to the suit, but must charge that in fact there was a surplus of the intestate's estate after payment of all debts and incumbrances. *Stephens v. Frost*, 297

16. Where, after demurrer allowed for want of parties, the plaintiff is permitted to amend by adding parties, he is likewise permitted to amend by charging all such matters as constitute the equity of the case against the new defendant. *Ibid.*

17. In a bill, to which a plea of purchase for valuable consideration without notice might be pleaded, it is not necessary to charge notice; and if the plaintiff does charge notice, it is sufficient for him to charge it generally, without averring facts as evidence of the charge. Therefore, under a general charge of notice, evidence of particular facts and conversations may be given. *Hughes v. Garner*, 328

18. The testimony of one witness, though uncorroborated by circumstances, is a sufficient ground for a decree, if the answer deny the fact upon belief only, although the answer be positive, and there are no other means of contradicting the fact. *Ibid.*

On appeal from this decision, an issue was directed as to the fact. *Garner v. Hughes*, 731

19. Under the usual decree against an executor to account, the Master is not at liberty to investigate a disputed account arising out of partnership transactions between the testator and the executor, the latter swearing that the balance is in his favour; but, under such circumstances, the plaintiff may have relief by supplemental bill, without exhibiting an interrogatory in the original suit for the examination of the executor. *Cropper v. Knapman*, 338

20. Where one of two executors was a partner with the testator, the residuary legatees may sustain a bill for an account of the partnership transactions against the executors, though collusion between them is neither charged nor proved. *Ibid.*

21. A demurrer in bar of relief, without mentioning discovery, where the bill merely prays discovery, is bad. *Mills v. Campbell*, 389

22. A bill for a commission to examine witnesses abroad, in aid of a defence to an action at law, is not a bill for relief. *Ibid.*

23. Where a bill for discovery against an assured alleged that he had been employed to procure the goods which were the subject of the policy:—*Held*, that a demurrer to the discovery would not hold, although the bill stated that the defendant had been paid and satisfied the full value of the goods; the object of the bill being to ascertain whether he was not a mere agent. *Mills v. Campbell*, 391

24. A bill brought by the Lloyd's underwriters and the Corporation of the London Assurance in respect of policies underwritten by each of those parties respectively, is not multifarious; although the Lloyd's policies are not under seal, and those of the London Assurance are under seal. *Id.*

25. Since the *Reg. Gen. Hil. Term*, 4 Will. 4, a defendant in an action of *assumpsit* brought on a policy of insurance, must plead the plaintiff's want of interest specially. *Ibid.*

26. The bill alleged that the plaintiff A. had sold Blackacre to B., upon an agreement that B. should execute to him a mortgage both of Blackacre and Whiteacre; that the mortgage was accordingly made, and that B. afterwards mortgaged Blackacre to C. The bill then, after alleging that B. had conveyed Whiteacre to a purchaser for valuable consideration without notice of the mortgage, prayed a foreclosure of Blackacre:—*Held*, that the purchaser of Whiteacre was a necessary party to the suit. *Payne v. Compton*, 457

27. *Seem*, that purchase for a valuable consideration without notice is available as a defence against a plaintiff who relies on a legal title. *Ibid.*

28. Upon a bill implicating a married woman in various frauds alleged to have been committed by her husband, in obtaining certain policies of insurance, and praying to have the policies delivered up to be cancelled:—*Held*, that her answer and disclaimer, denying that she had any interest in the policies, or any separate property, was insufficient. *Whiting v. Rush*, 546

29. Defendants, by their answer to a vicar's bill, denied the right of the vicar to the tithes claimed, alleging the right to be in the rector. Plaintiff then amended his bill, charging that the defendants ought to set forth what tithes the rector was entitled to, and how his right was made out. Defendants demurred to this part of the amended bill:—*Held*, that the demurrer was overruled by the answer. *Salkeld v. Phillips*, 580

POLICY OF INSURANCE.

See PLEA AND PLEADING, 12, 13, 24.

POOR RATE.

See EVIDENCE.

PORTIONS.

See MARRIAGE SETTLEMENT.
WILL, 5, 7.

PRACTICE.

See CONTEMPT.

PRODUCTION OF DEEDS AND DOCUMENTS.

REHEARING.

SCANDAL AND IMPERTINENCE.

1. Record amended by adding counsel's name to the answer. *Whitehead v. Cunliffe*, 3

2. Order made ex parte to discharge a defendant in contempt for not answering, on certificate of answer filed and tender of costs. *Edmonson v. Heyton*, *Ibid.*

3. Where a decree had been obtained in Chancery for the general administration of the testator's assets, a bill previously filed in this Court by an annuitant under the will against the executors was dismissed; and as the annuitant's bill had been filed with undue haste, she was not allowed the costs of the application to stay proceedings, although she was allowed her costs up to the time of notice of the decree. *Hayward v. Constable*, 43

4. A defendant in contempt for want of an answer, cannot move to have the bill dismissed, even upon the terms of giving the plaintiff all the advantage of a decree: his proper course is, to move to set aside the attachment. *Lord Cranstown v. Goldshede*, 70

5. Upon a bill of discovery in aid of a defence at law, and an injunction to restrain the proceedings at law, the Court will not dissolve the injunction before the coming in of a defendant's answer, upon presumptive evidence of his death, if that evidence, though strong, be qualified by circumstances tending to a contrary conclusion. *Janson v. Solarte*, 127

6. Answer read as an affidavit of a fact, and affidavit admitted to contradict the answer upon that fact. *Ibid.*

7. A plaintiff who gives a false description in the bill of his place of residence, will be made to give se-

curity for costs, although, from the nature of his trade, he has no residence. *Calvert v. Day*, 217

8. Where, as a security for money advanced from time to time to A., the creditor of A. had taken various bills of sale and assignments of A.'s personal property, but had left A. in the visible user and enjoyment of that property; upon a bill filed by a subsequent judgment-creditor of A., impeaching the prior securities for fraud:—*Held*, upon motion before hearing, that the plaintiff was entitled to the production of the several bills of sale and assignments. *Neate v. Latimer*, 257

9. Auctioneer in the country appointed to conduct the sale under a decree, to avoid the expense of sending the Master's clerk. *Thompson v. Hodgson*, 311

10. Papers and documents produced by the defendant for the plaintiff's inspection, ordered, upon motion before hearing, to be re-delivered to the defendant, the plaintiff having had full opportunity to inspect them. *Jones v. Thomas*, 312

11. The Court will not vacate the enrolment of a decree, on the mere ground that it was obtained with extraordinary haste. *Hughes v. Garner*, 335

12. *Quære*, how far parties, claiming in different interests, can join as plaintiffs in a bill of revivor and supplement? *Smith v. Smith*, 353

13. The plaintiff may shew exceptions for cause against dissolving the common injunction, although he may have given notice of shewing cause on the merits; and it will be sufficient if the exceptions are filed before cause is actually shewn. *Wilkinson v. L'Eaugier*, 363

14. Upon the coming in of the defendant's answer, in an insurance cause, the Court refused to allow the plaintiffs to amend their bill by adding charges relative to matters which might, with proper diligence, have

been originally put in issue by the plaintiff. *Mills v. Campbell*, 398

15. If, upon demurrer for want of parties, the plaintiff give notice of submitting to the demurrer within two days before the day on which the demurrer is set down for argument, he cannot amend his bill without a special application for that purpose. *Lenthwaite v. Clarkson*, 370

16. Submitting to a demurrer for want of equity, puts the bill out of court, and it can only be restored under special circumstances. *Ibid.*

17. Where a decree had been pronounced in the Court of Chancery for the general administration of a testator's assets, the proceedings under a bill filed in this Court by an annuitant under the will against the executors were stayed although the decree in Chancery was not drawn up. *Moore v. Prior*, 375

18. The laches of the plaintiffs, in a bill for discovery in aid of a defence at law, is not a ground for depriving them of a commission for the examination of witnesses abroad, though it is a ground for putting them to more severe terms. *Mills v. Campbell*, 402

19. Exhibit not proved at the hearing, upon special application allowed to be proved *viva voce* at the rehearing. *Lovell v. Hicks*, 480

20. Notice of a motion to dismiss the bill for want of prosecution must be served on the party's clerk in court, and not on his solicitor; and if the clerk in court be dead, a new clerk in court must be nominated for the purpose of accepting such service. *Miller v. Arrowsmith*, 563

21. After motion by the defendant to dismiss the bill for want of prosecution, the plaintiff wishing to amend his bill must shew special cause of amendment against the order for dismissal, and give two days' notice of the cause which he intends to shew. *Harbett v. Buckingham*, 571

PRINCIPAL AND SURETY.

22. Filing a cross bill against a party who is in contempt in the original suit, is a waiver of such contempt on the part of the party who files it; and the defendant in the cross suit, by clearing his contempt in that suit, will clear it in both.

Best v. Gompertz, 582

23. The conduct of a creditors' suit taken out of the hands of the plaintiff, on the ground of delay and mismanagement in regard to the sales of real estates, delay in the payment of money into Court, and the appropriation by the plaintiff's solicitor of rents and profits of the estates in discharge of his costs. *Price v. North*, 628

24. In the Court of Exchequer, the Commissioners for the examination of witnesses in aid of the proceedings before the Master after decree, are not sworn to secrecy. *Hall v. Clee*, 725

PRESUMPTION.

See LEGACY AND LEGATEE, 2, 7.

STATUTE OF LIMITATIONS.

PRINCIPAL AND AGENT.

See ACCOUNT, 1, 2.

1. If a man, being indebted to his own agent, authorize the agent to receive money due to him from his debtor, intending that the agent should thereout pay himself his own debt, he thereby gives the agent an implied authority to receive payment, to the extent of his own debt, in any manner he may think fit; consequently, the amount of the agent's own debt may be written off in account between him and the debtor. *Barker v. Greenwood*, 414

2. A debtor, who pays the amount of his debt to the agent of his creditor, must pay it in cash, unless he can shew that the agent had authority to receive payment in any other way. *Ib.*

PRINCIPAL AND SURETY.

A., and B., as his surety, having given a joint and several promissory

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note to C., the latter brought separate actions against A. and B. upon the note, and recovered judgment in both actions; C. afterwards issued execution upon the judgment obtained against B., whereby B. was compelled to pay the whole debt and costs. Upon a bill filed by the administratrix of B., for the purpose of obtaining an assignment of the judgment which had been recovered against A., the principal debtor:—*Held*, that such judgment not being available at law in the hands of the creditor, was not available in equity in the hands of the surety, and consequently that the Court could not compel an assignment, as sought by the bill. *Dowbiggen v. Bourne*, 402

PRISONER.

See CONTEMPT.

PRODUCTION OF DEEDS AND PAPERS.

See PLEA AND PLEADING.
PRACTICE.

1. Upon a rector's bill for tithes, and a supplemental bill for discovery of documents impeaching the defence:—*Held*, that the defendant was not bound to produce certain old briefs in his possession, in order to prove the plaintiff's allegation that a former rector's bill, which had been met by the same defence, was dismissed in consequence of collusion between the parties. *Knight v. Marquess of Waterford*, 30

2. *Held*, also, that the defendant was not bound to produce certain leases which had been granted by his predecessors of the lands for which the tithes were sought. *Ibid.*

3. A plaintiff is not entitled to the production of documents which cannot, from their nature, be evidence of his title, though they may impeach that of the defendant. *Ibid.*

4. Cases stated for the opinion of counsel, whether of old date, or made

with reference to or in contemplation of an existing suit or action, are not evidence against the party on whose behalf they are stated, or whose interests they affect; therefore, if they tend to impeach that party's title, he is not compellable by suit in equity to produce them. *S. C.* 37

5. Confidential letters between solicitor and client are similarly protected. *Ibid.*

6. Upon a bill by a rector for tithes against a lord of a manor who claims tithes within the manor, the defendant may be ordered to produce old maps of the manor, and also the court-rolls, unless they relate to the title of his own lands within the manor. *Ib.*

7. An answer to a former bill for the same matter, though not filed, is to be deemed a public document, unless the contrary be shewn; if, therefore, it relate to the plaintiff's title in an existing suit, the defendant, in whose custody it is, will be ordered to produce it, unless he can swear that it was not intended to be used as an answer. *Ibid.*

8. Deeds and documents admitted by the answer being very numerous, the usual order for their production may be qualified by a direction that they be inspected, &c. at the office of the defendant's attorney. *Crease v. Penprase*, 527

9. Where the records in certain proceedings in a Welch court of judicature had, by an order improperly obtained in this Court, been deposited with an officer in this Court:—*Held*, nevertheless, that they were to be deemed to be in the proper custody until the order so obtained should be rescinded. *Grenfell v. Girdlestone*, 662

PROMISSORY NOTE.

See PLEA AND PLEADING, 14.
PRINCIPAL AND SURETY.

PROMOTIONS.

See MEMORANDA.

RULES OF THE BENCH.

PURCHASER WITHOUT NOTICE.

See VENDOR AND PURCHASER.

RAILWAY COMPANY.

See CONSTRUCTION OF ACT.—COSTS.

REAL COMPOSITION.

See TITHES.

RECEIVER.

See WILL, 4.

RECTOR.

See PLEA AND PLEADING, 6.

PRODUCTION OF DEEDS & PAPERS.
TITHES.

REGULÆ GENERALES.

See GENERAL ORDERS.

REHEARING.

1. The general rule is, that no other evidence can be given at a rehearing than might have been given at the original hearing. Therefore, where a document is not included in the order of course to prove exhibits *vidæ voce* at the hearing, or when the plaintiff has obtained no such order, he cannot obtain an order to prove an exhibit *vidæ voce* at a rehearing without a special application. *Lovell v. Hicks*, 472

2. Facts which have occurred since the decree, and which, therefore, were not comprehended in the pleadings, may be proper ground for a rehearing, if they shew error in the decree. *Story v. Johnson*, 586

3. After leave has been given for a rehearing in the Court of Exchequer, it is unnecessary for the petitioner to state in his petition of rehearing in what respect he conceives the decree to be erroneous, or what is the nature of the decree he seeks. *Ibid.*

RULES.

See GENERAL ORDERS.

RULES OF THE BENCH.

See CONTEMPT.

SALE IN THE COUNTRY.

See PRACTICE, 9.

SALE UNDER DECREE OF THE COURT.

See VENDOR AND PURCHASER, 4, 5.

SCANDAL AND IMPERTINENCE.

1. The master having reported certain passages in the depositions taken for the defendants to be scandalous and impertinent, but having made no report as to the frame of the interrogatories:—*Held*, that the defendants were not liable to the costs of the reference, &c. *Gude v. Mumford*, 445

2. The attorney for the defendants having been examined as their witness, and having made certain scandalous and impertinent statements in his deposition in reply to the last interrogatory, was compelled to pay the costs of expunging such scandalous and impertinent matter. *S. C.* 446

3. *Semble*, that the examiner is not liable for the costs of expunging scandalous and impertinent matter from depositions made in answer to specific interrogatories, nor from depositions made in answer to the last interrogatory, where the deposing witness is an attorney in the cause. *Ibid.*

SECURITY FOR COSTS.

See PRACTICE, 7.

SETTLEMENT.

See ASSIGNMENT.

MARRIAGE SETTLEMENT.

SIGNATURE OF COUNSEL.

See PRACTICE, 1.

SOLICITOR.

*See ATTORNEY.*ATTORNEY AND CLIENT.
COSTS.PRODUCTION OF DEEDS.
VENDOR AND PURCHASER, 7.

SPECIFIC PERFORMANCE.

See ARBITRATION.
PRACTICE, 26.

STATUTE OF LIMITATIONS.

See LEGACY AND LEGATEE, 2, 3.

1. Where accounts are referred to an arbitrator, with a special agreement as to the mode in which they are to be taken, and afterwards, upon the failure of the arbitration, the same accounts are referred to the Master, he will be directed to take them in the ordinary way, and not according to the special agreement. Therefore, where, under such circumstances, it was one of the terms of the agreement that no advantage should be taken of the Statute of Limitations:—*Held*, that the Master was not to be ruled by that stipulation. *Cheslyn v. Dalby, et e contra*, 170

2. *Quære*, whether, since the stat. 9 Geo. 4, c. 14, the recital in a deed of the existence of a debt, coupled with parol evidence only as to its amount, is sufficient to take it out of the Statute of Limitations? *Ibid.*

3. *Semble*, that since the stat. 9 Geo. 4, c. 14, an acknowledgment of the debt by the debtor to a third person is not sufficient to take the case out of the Statute of Limitations. *Grenfell v. Girdlestone*, 662

STOCK.

See BANK OF ENGLAND.—DISTRINGAS.

SUPPLEMENTAL BILL.

See PLEA AND PLEADING, 19.

TERRIER.

See TITHES, 4, 5.

TITHES.

See MODUS.

PLEA AND PLEADING, 6, 29.

PRODUCTION OF DEEDS AND DOCUMENTS, 1, 2, 3, 4, 5, 6, 7.

1. Where a bill was brought for the customary tithes of oysters, alleging the customary payment to be in the owners and occupiers of the boats employed in the fishery, and usually moored within the parish:—

Held, that it was not necessary to make the dredgers for the oysters, who had no interest in the boats, but who shared in the profits of the oysters, parties to the bill. *Perrott v. Bryant*, 61

2. Oyster dredgers agreeing to receive from the owners of the boats, who were their employers, a stipulated share of the profits arising from the sale of the oysters, held not to be co-adventurers with the owners. *Ibid.*

3. Vicar's bill for great and small tithes of an ancient park, which had been disparked and thrown into cultivation, dismissed; there being no evidence of perception or of receipt of compositions for tithes by the vicars in respect of the lands within that district, although it was proved that compositions for tithes had been regularly paid to the vicars in respect of the other lands in the township in which the park was situate. *Hall v. Farmer*, 145

4. A terrier without date, and bearing the signatures of various persons, having no addition or designation affixed to their names, is admissible in evidence on behalf of the vicar, if produced under circumstances shewing it to be a genuine document. *Ib.*

5. The words "privy tithes" are generally synonymous with "small tithes;" therefore, although the Ecclesiastical Survey appeared to distinguish between privy tithes and small tithes, yet this was held to be explained by a subsequent terrier, which mentioned privy tithes, in contradistinction to tithes in general, as being payable to the vicar; and, under these circumstances, supported by evidence of former vicars having regularly received payments called "privy tithes," although those payments had been in some instances made for houses only, and in other instances omitted altogether, and although some portions of the small tithes were proved by the defendants

to have been conveyed away:—*Held*, that the vicar was entitled to a decree for small tithes. *Hall v. Godson*, 153

6. The reasonableness of setting out every tenth turnip, instead of every tenth heap of turnips, for the parson, must depend upon whether, by that mode of tithing, the parson has an opportunity of seeing that the tithe is fairly set out. *Clarke v. Clarke*, 245

7. To a rector's bill against occupiers of lands for an account of tithes, the defendants, by their answer, set up an ancient agreement between a former rector of the rectory and the then owner of the lands occupied by the defendants, and who was also the patron of the living; by which agreement certain lands enjoyed by the present rector were allotted to the rector in exchange for his glebe lands, which were then dispersed in the common fields, and a rent-charge of 40*l.* a year was granted to the rector; in consideration of which exchange and annuity, the lands occupied by the defendants were discharged from tithes. The defendants proved that the agreement was not only approved by the then bishop of the diocese, but had been established by a decree of the Court of Chancery, and had been acted upon for upwards of a century; and that the arrangement was not only beneficial to the rector at the time when it was entered into, but that it was made with reference to the probable future increase in the value of the tithes, and that it was advantageous to the plaintiff at the time of the filing of the bill:—*Held*, however, that the agreement was absolutely void under the disabling statutes; and that, being void, the decree of the Court of Chancery could not give it validity; and an account of the tithes was decreed. *Thorpe v. Mattingley*, 421

8. Where a bill for tithes was filed against occupiers of lands within the

time prescribed by the statute 2 & 3 Will. 4, c. 100, and the bill was subsequently, and after the period limited by the act, amended, by making the owner of the lands a party:—*Held*, that the original and the amended bill formed but one record, and that the suit was therefore instituted against the owner within the time prescribed by the statute. *Ibid*.

TRUSTEE.

See CHARITY, 4.—WILL, 3.

1. Testator having devised a real estate to his three executors upon trust, to sell and apply the produce of the sale as part of his personalty, and having given to one of his executors an option to purchase the estate at a certain price, the two other executors conveyed it to him, and joined in a receipt for the purchase money. The purchase money was, in fact, not paid, and afterwards the third executor became bankrupt:—*Held*, that the two other executors were answerable to the residuary legatee for the deficiency. *Gregory v. Gregory*, 313

2. A trustee having direction to sell the trust property submitted to a decree for sale in a suit instituted in relation to the trust:—*Held*, that the Court was not therefore bound to carry the sale into execution. *Polley v. Seymour*, 708

TURNIPS.

See TITHES, 6.

UNDERWRITER.

See PLEA AND PLEADING, 12, 13, 24.

USURY.

See MORTGAGOR AND MORTGAGEE, 1.

VENDOR AND PURCHASER.

See CREDITORS' SUIT.

1. Upon the death of one of two partners, intestate, the personal representatives of the deceased partner agreed to sell his moiety of the real property

of the partnership to the surviving partner, and at the same time stipulated that they would furnish him at their own expense with an abstract of their title to that moiety:—*Held*, that they were bound to furnish the usual abstract of title, and not merely the letters of administration under which they acted in relation to the intestate's personal estate. *Morris v. Kearsley*, 159

2. An estate was devised to trustees, upon trust by sale or mortgage, to discharge a specific debt, and to apply the residue for the benefit of the testator's children. A. purchased the estate of the surviving trustee (who was A.'s father), but left the purchase money (except what was required to satisfy the debt) unpaid, giving his bond as a collateral security for the payment of it. Between the time of the contract and the actual conveyance of the premises, A. entered into marriage articles, whereby he covenanted to settle the premises upon his intended wife and her issue. After A.'s marriage and the execution of the conveyance, a settlement was made in pursuance of the articles. The settlement recited the conveyance, and the conveyance referred to the will:—*Held*, that the settlement conveyed notice of the will, and that such notice was binding on the wife and children of A., although the articles were silent as to the will; consequently, that the testator's children were entitled, as against the children of A., to a lien on the estate, for the amount of the purchase money left unpaid. *Davies v. Thomas*, 234

3. A party claiming to be a purchaser for a valuable consideration without notice, under a marriage contract, must shew that he had no notice at the time of the settlement: proof that he had no notice at the time of the articles is not sufficient. *Ib*.

4. Where a sale had been directed under a decree, but there was no re-

ference to the Master as to the title, and no available fund in Court:—*Held*, that the purchaser was entitled to be reimbursed by the plaintiff the costs of investigating the title and confirming the purchase. *Berry v. Johnson*, 564

5. Purchaser, under circumstances, allowed to pay his purchase money into Court, and to be let into the possession and receipt of the rents and profits without prejudice to any subsequent objection which he might be advised to make to the title. *Marfell v. Rudge*, 566

6. Misdescription of the quantity of land in regard to the acres being statute acres or customary, is not matter of compensation, but a ground for setting aside the sale. *Price v. North*, 620

7. *Quære*, whether any party, except the plaintiff, in a creditors' suit, can apply to open the biddings, or to set aside a sale made by order of the Court in that suit. *Ibid.*

8. Payment to the solicitor for all parties in the suit, is equivalent to payment into Court. *Ibid.*

VESTED INTEREST.

See ASSIGNMENT.

LEGACY AND LEGATEE.

VICAR.

See TITHES.

VOLUNTARY SETTLEMENT.

See ASSIGNMENT.

WARDEN OF THE FLEET.

See CONTEMPT, 2.

WATERWORKS' COMPANY.

See CONSTRUCTION OF ACT.

MORTGAGOR AND MORTGAGEE, 4.

PERSONAL ESTATE, 1, 2.

WILL.

See CHARITY.—LEGACY & LEGATEE.

1. Testator devised an estate in Jamaica to trustees upon trust, so long as *Robert B.*, the second son of his daughter *E. B.*, should be under

the age of twenty-one years, to pay and apply 150*l.* per annum out of the rents and profits for his maintenance and education, and subject thereto upon various other trusts, in favour of his daughter *E. B.*, and his said grandson *Robert B.*; and, subject to all those trusts, in trust for the said *Robert B.* for life, with remainder to his first and other sons in tail male, with remainder in moieties in favour of *H. C.* and *R. C.*, the second and third sons of his daughter *I. C.*, and their issue. The testator also devised his estate in England in trust for his said daughter *E. B.*, for life, with remainder to his said grandson *Robert B.* for life, with remainder to his first and other sons in tail male, with remainder to the *third, fourth, fifth*, and every other son of the said *E. B.*, severally and successively in tail male, with remainder to the testator's right heirs. *E. B.* had no second son named *Robert*. The name of her eldest son was *Robert*, and that of her second son *Henry*:—*Held*, under these circumstances, that this was a mistake in the name, and not in the description of the devisee; and consequently, that *Henry*, and not *Robert*, was entitled to take under these devises; and parol evidence was admitted to explain the ambiguity. *Bradshaw v. Bradshaw*, 72

2. A testator, being seised in fee of a farm in the parish of A., and being also possessed of a lease for lives of the rectorial tithes of that parish, devised the farm to his nephews in tail male, and the lease to his brother J., his executors, administrators, and assigns, upon condition that his said brother J., his executors, administrators, and assigns, owners or occupiers of the said parsonage, tithes, and premises, should, at all times after his decease, free and discharge his said farm from all manner of tithes which should be payable out of the same to the said owner or oc-

cupier of the parsonage and tithes aforesaid. J. survived the testator, and devised his interest in the lease to his four sons, who took several renewals, and in 1782 assigned the existing lease, for a valuable consideration, to A. B., with notice of the trusts of the will:—*Held*, that a party to whom the tithes were bequeathed by the will of A. B., and who took a renewal of the lease in 1817, held the renewed lease upon the trusts of the will; consequently, that he had no title to the tithes of the farm, and that the owner of the farm was not bound to contribute to the renewal fines. *Webb v. Lugar*, 247

3. Trustee, after devising certain real estates to different persons, gave and devised all his real estates, not before disposed of by his will, to A. B., his heirs, executors, administrators, and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit:—*Held*, that, under this devise, the trust estate passed. *Bainbridge v. Lord Ashburton*, 347

4. The circumstance that the party who has the administration of the testator's real and personal effects is an uncertificated bankrupt, and was not appointed to his office by the testator, is not a sufficient reason to induce the Court to appoint a receiver before answer, where several of the parties interested decline to join in the application. *Smith v. Smith*, 353

5. Portions held to be raisable before the time of payment, under the particular construction of the will by which they were given. *Selby v. Gillum*, 379

6. Where a testator made special provision for the maintenance of his younger children until receipt of their portions, and stated the sum appointed for the maintenance of the sons to be "in lieu of interest":—*Held*, that the daughters were not entitled to interest on their portions, although there was

a general clause in the will that the trustees should stand possessed of the trust funds, and the interest, dividends, and annual produce thereof, for the benefit of the daughters, upon their attaining twenty-one. *Ibid.*

7. Testator devised one moiety of the proceeds of his real estate to his son for his life, and the other moiety to his, the testator's, wife, during her widowhood; and directed that in case of the wife's death or marriage in the lifetime of the son, her moiety should go to the son in the same manner as the first mentioned moiety. The testator then directed, that in case his son should die in the widowhood of his mother, and leave lawful issue, the son's moiety (and, after the widow's death or marriage, her moiety) should become the property of such issue. The testator then devised as follows:—"But in case of such, my son's, demise in the widowhood of his said mother, without leaving lawful issue, then I wish and direct the whole of the proceeds of my property to be paid to her during her widowhood, subject to an annuity of 40*l.* per annum to be paid to Mr. T. B.; and in case of the marriage or death of my present wife, my said son being dead, and leaving no lawful issue, then I give the whole of the proceeds of my estate to J. B." The testator's son survived the widow, and died without issue:—*Held*, that the contingency on which J. B. was to take the estate was destroyed, and that the heir at law of the testator was entitled. *Dicken v. Clarke*, 572

8. Devise to the testator's two brothers, Arthur (who was his heir-at-law) and Peregrine, one-third part each, share and share alike, of testator's lands and premises at A., subject to the life interest therein of the testator's father, the other remaining third part of the said lands and premises to the testator's sisters, Mary and Lucy, share and share alike,

making a sixth part to each, of the said lands and premises, and in case of their demise, he willed, bequeathed, and devised their respective shares to be equally divided among their children, or their lawful heirs, observing first, that his (the testator's) father was entitled to raise the sum of 2,000*l.*, by mortgage or otherwise, according to a bond executed to him by the testator:—*Held*, first, that the words “in case of their demise,” applied to the devise to the two sisters only, and had no reference to the previous devise. Secondly, that the devise to the younger brother was for life only; and, thirdly, that the two sisters took estates for life only in the shares devised to them, with remainder to their children, as tenants in common in fee. *Bowen v. Scamcroft*, 640

9. Words of recommendation in a will held not to amount to a trust. *Ex parte Payne*, 636

10. Testatrix devised the residue of her real and personal estate to W. S., his heirs, executors and administrators, according to the different natures and qualities thereof, upon the trusts following, that is to say, upon trust to retain and keep the same in the state it should be in at the time of her decease as long as he should think proper, or to sell and dispose of the whole, or such part thereof as and when he or they should from time to time think expedient, either by public auction or private contract, to any person or persons who should be willing to become the purchaser or purchasers; and then upon trust to invest the money to be produced by such sale or sales, together with all ready monies of the testatrix, in his or their own name or names, and in that of two of the residuary legatees therein named, in the public funds, or

upon real or government securities; and then the testatrix directed that the said W. S., his heirs, executors, or administrators, should stand possessed of and interested in all such the general residue of her real and personal estate, and from and after such sale, then of the stocks, funds, and securities whereon the same or any part thereof should have been invested, in trust, out of the rents, issues, and profits, interest, dividends, and proceeds thereof, to pay several life annuities; and from and after full payment and satisfaction thereof, the testatrix directed that the said W. S., his heirs, executors, and administrators, should stand possessed of all the said residue of her said real and personal estate and effects, and of the stocks, funds, and securities whereon the same or any part thereof should have been invested, and the rents, issues, and profits, interest, dividends, and produce thereof, in trust for five of the said annuitants, (including the said W. S.), in equal shares and proportions, as tenants in common, and for their respective heirs, executors, administrators, and assigns, according to the different natures and qualities thereof:—*Held*, that, upon the terms of this will, it was not the intention of the testatrix that the property should be converted out and out, but that W. S. had a discretion to sell the whole or any part of it when and as he might think expedient, and that until he exercised that discretion the property must be considered to remain in the state it was at the time of the death of the testatrix. *Polley v. Seymour*, 708

WITNESS.

See PLEA AND PLEADING, 18, 22.
PRACTICE, 18.



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